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## Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will

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# Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will

*Andrew P. Morriss\**

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## INTRODUCTION

Like many other types of contracts, employment contracts are frequently incomplete, with important terms missing or unclear. Courts have created a variety of rules to assist in filling these gaps. One of these rules, the employment at-will rule, specifies a default rule which governs in cases where the parties to an employment contract fail to explicitly state the contract's duration. The at-will rule is straightforward, providing that where the term of the contract is indefinite, both the employer and employee are free to terminate the contract without liability at any time. An employee with an at-will contract who is fired has no recourse against her employer, regardless of the employer's reason for firing her.<sup>1</sup> Similarly, employers are unable to sue employees who quit. While courts differ on some secondary issues, such as what evidence is sufficient to overcome the at-will presumption, the rule itself is clear and concise.

This simple default rule has produced a surprisingly large amount of literature concerning its historical origins. Not only have there been entire law review articles devoted to explaining its origins,<sup>2</sup> but a subsidiary debate has also arisen over whether the four cases cited in a footnote in support of the rule by an 1877 treatise are on point.<sup>3</sup> In addition, many of the modern court opinions and law review articles critical of the at-will rule have offered opinions on the rule's history.<sup>4</sup>

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1. Of course, even an at-will employee has a remedy for unpaid wages for past services.

2. E.g., Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976), and Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85 (1982).

3. See Feinman, *supra* note 2 at 125-27; Jay M. Feinman, *The Development of the Employment-At-Will Rule Revisited*, 23 ARIZ. ST. L. J. 733 (1991); Mayer G. Freed and Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990); J. Peter Shapiro and James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-43 n.54 (1972).

4. See, e.g., *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 783-84 (Conn. 1984); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time For*

This literature does not satisfactorily explain the rule's development. It not only fails to place the at-will rule in its proper historical context, but it also does not explain the rule in terms of the institution which created it: the common law state courts. This failure is due primarily to three mistakes: (1) Not focusing on the institutional nature of the decisionmakers who adopted the at-will rule; (2) narrowly focusing on the at-will rule without consideration of other legal developments; and (3) not considering the interstate variation in adoption of the rule within the United States. As a result of these mistakes, the legal literature has created a set of myths about the rise of employment at-will. The courts' uncritical acceptance of these myths has played a role in the erosion of the rule and the creation of the modern common law of wrongful discharge.

*Myth 1: A treatise writer made up the employment at-will rule in 1877.*

Fact: Employment at-will did not spring from "the busy and perhaps careless pen of an American treatise writer."<sup>5</sup> The at-will rule was adopted by seven states before Horace Wood published his 1877 treatise,<sup>6</sup> was present in the first draft of the proposed New York Civil Code drafted by David Dudley Field in 1862, and was included in the National Currency Act of 1863 for bank officers, as well as in earlier state banking statutes.

*Myth 2: The at-will rule was the product of nineteenth century industrialization.*

Fact: The pattern of adoption among states strongly suggests, and an empirical analysis confirms, that the at-will rule's spread was not linked to industrialization.

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*A Statute*, 62 VA. L. REV. 481, 484-87 (1976); and Committee on Labor and Employment Law, Association of the Bar of the City of New York, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. B. ASS'N. CITY N.Y. 170, 171-73 (1976). There are many others.

5. Theodore J. St. Antoine, *You're Fired!* 10 HUM. RTS. 32, 33 (1982).

6. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES, (Albany, N.Y., John D. Parsons, Jr. 1877) [hereinafter WOOD, 1ST EDITION]. See part III.B.2 *infra*, for a discussion of the differences between Wood's first and second editions.

*Myth 3: The at-will rule was the result of judicial class prejudice.*

Fact: The at-will rule was adopted earlier in states where judicial class prejudice was less (the Midwest) and gained acceptance relatively late in states where judicial class prejudice was greater (New England).

*Myth 4: The treatment of employment contracts in the United States was heavily biased against employees by the at-will rule, while European nations provided rules more favorable to employees.*

Fact: The European civil law systems did not address the issue of indefinite employment contracts, while the United States' legal system treated employees more favorably than the British legal system in many respects.

In place of these myths, I suggest that the real significance of the at-will rule was the rule's location of authority to end an employment relationship. By giving firms unreviewable authority to terminate an employment contract<sup>7</sup> the employment at-will rule met employers' need for a control mechanism which allowed delegation of significant authority to employees. At the same time, the judicial adoption of the rule reflected the benefits to judges of a simple, clear rule which was consistent with the contemporary style of legal analysis.

But why look at the history now? Given that all but two states' courts had limited employment at-will in a significant fashion by 1993,<sup>8</sup> is there anything significant left to say? Although whether a different view of the historical origins of the at-will rule would have led to different results in particular past cases is now moot, employment law remains in a state of flux. The courts have not finished defining the contours of the new causes of action they have created. Nor have the critics of employment at-will been satisfied with the creation of common law exceptions to the at-will rule and many seek the abolition of at-will contracts.<sup>9</sup> Reexamining the historical origins of

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7. Firms' authority could, of course, be limited by the contract itself.

8. Those states are Florida and Rhode Island. See 9A INDIV. EMP. R. MAN. (BNA) 505: 51-52 (1993). Depending on how one counts court opinions, Georgia might also be considered to not have adopted any exceptions. See Andrew P. Morriss, *The Law and Economics of Employment At Will* (1994) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology, Economics) Chapter 4, *Conducting Empirical Research on the Common Law: A Case Study of the Decline of Employment at Will*.

9. The most complete proposals for reform are in Lawrence E. Blades,

employment at-will will be helpful in considering how far to go in limiting the at-will rule's erosion. By going beyond the narrow focus of the existing literature, we can recover the original functions of the rule. Only then is it possible to decide if the rule is truly an anachronism in today's economy or whether it still deserves consideration by the courts.

Most importantly, the uncritical acceptance of the mythology of the rise of the at-will rule has blinded modern courts to the rule's institutional and economic benefits. The at-will rule's distribution of authority within the courts has been largely ignored. Unlike the modern common law of wrongful discharge, the at-will rule prevents a certain class of disputes from reaching juries. As dissatisfaction with the modern common law of wrongful discharge grows,<sup>10</sup> the designers of the remedies would be well advised to reconsider the development to the at-will rule to retain the benefits of the at-will rule.

This paper takes a new approach to the history of the at-will rule. By exploiting the interstate variation in adoption, I econometrically test some of the explanations for the rule. After showing the inadequacy of the existing theories and the importance of court structure, I present a qualitative analysis that explains the rule as a response of the courts as institutions to the problems of nineteenth century employment law cases. Finally, I briefly examine two issues not addressed by the econometrics: The existence of United States exceptionalism and the interpretation of Wood's treatise.

## I. A SHORT HISTORY OF THE AT-WILL RULE

In 1884 the Tennessee Supreme Court gave a now classic statement of the rule:

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*Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988) [hereinafter, St. Antoine, *A Seed*]; Donald H. J. Hermann and Yvonne S. Sor, *Property Rights in One's Job: The Case For Limiting Employment At Will*, 24 ARIZ. L. REV. 763 (1982); Jack Stieber and Michael Murray, *Protection Against Unjust Discharge: The Need For A Federal Statute*, 16 J.L. REF. 319 (1983). These are discussed below. Less complete proposals along similar lines are made in Robert M. Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319 (1988); William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885 (1986); Committee on Labor and Employment Law, Association of the Bar of the City of New York, *At Will Employment and the Problem of Unjust Dismissal*, 36 REC. B. ASS'N. CITY N.Y. 170 (1976).

10. See, e.g., The Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 to -914 (1993), and the MODEL EMPLOYMENT TERMINATION ACT (1992).

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at-will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employe [sic] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer . . .

. . . .

. . . All may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong.<sup>11</sup>

The essence of the rule is captured by its name: employment is at will. As Richard Epstein has noted, the rule has the virtues of being short and meaning exactly what it says.<sup>12</sup> Whenever it was adopted by the various states, its adoption settled quickly and, until relatively recently, clearly the question of whether an employee with an indefinite-term contract could sue her employer if she was discharged. Once a state adopted the at-will rule, there was little doubt how a case where the rule applied would come out, and, consequently, there were few cases after adoption in which the question of how to interpret an indefinite-term contract arose.<sup>13</sup>

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11. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). Interestingly, *Payne* was not an employment case but a suit against an employer by a local merchant. The employer threatened his employees with discharge if they patronized the merchant's store, and the merchant's sales dropped precipitously. The merchant's claims failed because the at-will rule allowed the employer the freedom to fire his employees for any reason, including for shopping at the wrong store. *Hutton* overruled the portion of the *Payne* holding concerning the merchant's lack of remedy but not its adoption (in dicta) of the at-will rule. In overriding *Payne*, the *Hutton* court stated:

The real question was not, as assumed in that opinion, whether a master had the right to discharge his servants without liability to account to a third party for his reasons, good or bad, but it was whether the defendant had the right to injure the business of the plaintiff without any purpose to effect an advantage or benefit to itself. The plaintiff in that case could not lawfully question defendant's authority over its servants, but he could question the defendant's exercise of that authority solely for the purpose of destroying his business, the infliction of an injury on his business without legal justification, and hence an act malicious in law.

*Hutton*, 179 S.W. at 137. It thus distinguished the right of the employer to discharge the employee, which remained unlimited, from the right of a nonparty to the employment contract.

12. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984).

13. There were many cases, of course, in which the rule was mentioned. Most of these, however, involved the threshold question of whether the duration of a contract

The rule did not disappear from American jurisprudence after settling this question. Some ambiguity arises in determining when a contract is indefinite. Although the at-will rule is a default rule, and so applies only when the parties have not specified an alternative in their contract, there has been substantial disagreement over what constitutes evidence of the parties' intent to choose an alternative rule.<sup>14</sup> For example, many contracts which do not explicitly state a duration do mention a period in stating the employee's compensation as \$X per day, month, or year. Contracts also may provide for periodic payments of wages, the period for which may be inconsistent with the period for calculating the wages. Finally, contracts may specify an indeterminate term such as "for life"<sup>15</sup> or term the employee's position a "permanent" one, and courts have applied the at-will rule to these as well.<sup>16</sup>

How a state's courts chose to resolve these questions certainly mattered a great deal to many people. If the choice of a pay period was enough evidence to bring a case out of the at-will rule, for example, there would be few cases left within the rule. On the other hand, if courts chose to consider

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was indefinite or not, not the issue of how to interpret the contract once it was established that the duration of the contract was indefinite.

14. *Compare* *Chadwick v. Morris & Co.*, 170 Ill. App. 569, 570 (1912) (employer's agreement to statement by employee "I told him . . . that the least I would go for was fifteen hundred a year" insufficient to create a contract for a year); *Gibney v. National Jewelers' Board of Trade*, 144 N.Y.S. 321, 322 (N.Y. App. Div. 1913) (salary being calculated semimonthly establishes at-will hiring); *Potter v. City of New York*, 68 N.Y.S. 1039, 1041-43 (N.Y. App. Div. 1901) (contract to supervise construction of sewer system a contract for the period of construction despite calculation of pay on daily basis); *Hatch v. Sallinger*, 133 A. 621, 623 (R.I. 1926) (letter providing a guaranteed minimum salary for the first year creates a contract for at least one year); *Lewis v. Newton*, 67 N.W. 724, 725 (Wisc. 1896) (letter offering "a good season's work" sufficient to create a contract for at least as long as a saw mill was operating that year).

15. *E.g.*, *Starr v. Superheater Co.*, 102 F.2d 170, 172 (7th Cir. 1939) (employee claims life contract offered to persuade him to drop worker's compensation suit); *Pullman Co. v. Ray*, 94 A.2d 266, 267 (Md. 1953) (lifetime contract claimed as inducement to give up claims for workplace injury); *Savarese v. Pyrene Mfg. Co.*, 89 A.2d 237, 238 (N.J. 1952) (employee promised life contract if played baseball on company team); *Fisher v. John L. Roper Lumber Co.*, 111 S.E. 857, 858 (S.C. 1922) (employee claims a "living wage" offered for "the balance of his life" in exchange for agreement not to sue employer over injury).

16. *E.g.*, *Lord v. Goldberg*, 22 P. 1126, 1127-28 (Cal. 1889) (permanent contract is at-will); *Perry v. Wheeler*, 78 Ky. (12 Bush) 541, 548-49 (1877) (permanent means "parties bound together by ties to be dissolved only by mutual consent or for sufficient legal or ecclesiastical reasons"); *Sullivan v. Detroit, Ypsilanti & Ann Arbor Ry.*, 98 N.W. 756, 761 (Mich. 1904) (permanent employment is indefinite); *Murphy v. Publicker Indus., Inc.*, 516 A.2d 47, 49 (Pa. 1986) (lifetime contract is indefinite).



all contracts which did not specify a specific, definite period to be indefinite, then individuals attempting to write long-term contracts, but who did not include a definite term, would be unsuccessful in creating a contract, even if the circumstances suggested an intent to produce a long-term binding contract.<sup>17</sup>

We need not, however, be too concerned with the details of interpretation here. Courts needed some sort of rule for handling the case where no evidence at all existed on the parties' intent as to contract duration.<sup>18</sup> So long as the courts chose at least a moderately inclusive formulation of the rule, such as finding that rate of pay or pay period evidence alone was insufficient, then the rule chosen would be important independent of the cases at the margins of inclusiveness. The question of interest here is why the at-will rule was chosen as the default rule.

Employment at-will also played a part in the courts' restriction of legislative attempts to restructure employment contracts. Courts applied substantive due process theories in the last part of the nineteenth century and the early part of this century to strike state and federal laws regulating employment or discharge. These courts frequently found that these laws infringed on the freedom of employers and employees to contract at-will.<sup>19</sup> For example, in

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17. See, e.g., *East Line & Red River Ry. v. Scott*, 10 S.W. 99 (Tex. 1888). In *East Line*, which adopted the at-will rule in Texas, the Texas Supreme Court reversed a judgment for an employee who had alleged he had obtained a contract for employment "for whatever length of time which [the employee] might desire to retain such employment" in return for settling a personal injury claim. The court recognized that the contract gave the employee the right to fix any period, but because he had failed to fix a period prior to being discharged, the contract was indefinite and therefore at-will. *Id.* at 102-03. Such a result was clearly contrary to the intent of the parties.

18. As the experience of first year law students demonstrates, it is always possible to construct a case where the court must fall back on its own devices.

19. See, e.g., *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 F. 500, 514 (D. Nev. 1908) (injunction against union to prevent pickets, boycotts, etc. supported by right of employer to "refuse to have business relations with any person or with any labor organization"); *Boyer v. Western Union Tel. Co.*, 124 F. 246, 247-48 (E.D. Mo. 1903) (no basis for claim by union members discharged for membership); *People v. Western Union Tel. Co.*, 198 P. 146, 147 (Colo. 1924) (yellow dog statute unconstitutional); *Gillespie v. People*, 58 N.E. 1007, 1010 (Ill. 1900) (yellow dog law unconstitutional); *Atchison, Topeka, and Santa Fe Ry. v. Brown*, 102 P. 459, 460 (Kan. 1909) (statute requiring employer to give to discharged employees a written statement of true cause for discharge unconstitutional); *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 76 P. 848, 850 (Kan. 1904) (statute prohibiting discharge of union members unconstitutional); *State ex rel. Smith v. Daniels*, 136 N.W. 584, 585-86 (Minn. 1912) (statute prohibiting contracts not to belong to union unconstitutional); *State v. Julow*, 31 S.W. 781, 783 (Mo. 1895) (statute prohibiting contracts not to join

*Adair v. United States*<sup>20</sup> the United States Supreme Court argued that at-will contracts would be infringed upon by federal legislation prohibiting the discharge of union members because of their union membership. Its association with those cases accounts for much of many modern commentators' and courts' distaste for the at-will rule.

That distaste is at least partly misplaced. Decisions like *Adair* relied not on the existence of an at-will *default rule* but on the existence of at-will *contracts*. Although it is not uncommon today for commentators to call for the judicial or legislative abolition of at-will contracts,<sup>21</sup> I have found no evidence of any similar sentiment in the adoption period. Commentators, counsel, or dissenting judges may have advocated a different default rule or a different approach, but there is little doubt that employers and employees could have chosen to enter into at-will contracts, regardless of the default rule, by explicitly stating their intention to do so.<sup>22</sup> So long as such contracts were possible, the *Adair* court's analysis, and others like it, would be unaffected by the choice of a different default rule.<sup>23</sup>

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union unconstitutional); *People v. Marcus*, 77 N.E. 1073, 1075 (N.Y. 1906) (statute prohibiting contracts not to join unions unconstitutional); *Bemis v. State*, 152 P. 456, 462 (Okla. Crim. App. 1915) (statute prohibiting contracts not to join unions unconstitutional); *Commonwealth v. Clark*, 14 Pa. Super. 435 (1900) (holding statute prohibiting discharge because of union membership unconstitutional); *St. Louis S.W. Ry. v. Griffin*, 171 S.W. 703 (Tex. 1914) (holding blacklisting statute unconstitutional).

20. 208 U.S. 161 (1908).

21. See, e.g., *St. Antoine, A Seed*, *supra* note 9, at 81 ("Unjust dismissal makes no sense ethically, little sense legally, and at best marginal sense in industrial relations and economic terms. Its elimination is fast becoming a moral and historical imperative.") and *Summers*, *supra* note 4, at 484 ("The central thesis of this article is that the anachronistic . . . [at-will] rule . . . should be abandoned, and the protection now given by arbitration under collective agreements should be extended to employees not covered by collective agreements.")

22. Explicit at-will clauses predate their current fashionability. See, e.g., *New Departure Mfg. Co. v. Rockwell-Drake Corp.*, 270 F. 219, 222 *aff'd in part, rev'd in part* 287 F. 328 (2nd Cir. 1922) ("Employee is to remain in the employ of the company . . . so long as the company shall elect . . ."); *Parks v. City of Atlanta*, 76 Ga. 828, 829-30 (1886) (city ordinance provided that "[t]he board of fire-masters shall have the power to suspend at-will, also to fine or dismiss, any of the officers or men. . . ." held sufficient to justify nonsuit of wrongful discharge suit); *Wilmington Coal Mine & Mfg. Co. v. Barr*, 2 Ill. App. (Bradw.) 84, 87 (1878) ("IV. Any employee may be discharged at any time without previous notice, and any employee wishing in good faith to leave the company's service may do so at any time without giving previous notice . . .").

23. Consider, for example, the decisions striking laws requiring employers to furnish employees with a statement containing the reason for the discharge. E.g., *St.*

Moreover, these cases are independent of the at-will rule's function as a default rule in interpreting individual contracts. No modern court continues to embrace the freedom of contract/substantive due process theories used by the late-nineteenth and early twentieth century courts, yet not a single state has judicially repudiated the employment at-will rule as a default rule, despite making significant inroads into its scope. One need not, therefore, admire the reasoning of the *Lochner* court to find value in the at-will rule.<sup>24</sup>

At some point early in this century, the at-will rule became the generally accepted default rule in the United States. A lengthy period of relative quiet ensued. The rule appeared occasionally in cases where the evidence was on the margins of acceptance for overcoming the rule, but by mid-century an equilibrium had been reached in which cases which would be barred by the rule were, for the most part, simply not brought.<sup>25</sup>

In 1959, an intermediate appellate court in California significantly modified the rule's scope. In *Petermann v. International Brotherhood of Teamsters*,<sup>26</sup> the court allowed a claim by a Teamsters' business agent against

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Louis S.W. Ry. v. Griffin, 171 S.W. 703 (Tex. 1914). In *Griffin* the court reasoned that if an employer could not be required to have a cause to dismiss an at-will employee, it could not be indirectly required to do so by requiring a cause to be stated. So long as the statute was challenged by an employer who had at-will contracts with its employees, explicit or not, the same reasoning would apply. The reasoning thus made no use of the default status of the rule. *Id.* at 706-07.

Moreover, courts were capable of using alternative methods to render such statutes ineffective. In Ohio, for example, the court of appeals simply construed a similar statute to not provide a private cause of action rather than relying on freedom of contract arguments. *Crall v. Toledo & Ohio Cent. Ry.*, 7 Ohio Cir. Dec. 132 (1894).

24. *Lochner v. New York*, 198 U.S. 45 (1905). This is not to assert that the "constitutionalizing" of employment at-will by the Supreme Court in the 1908 *Adair* decision did not profoundly affect the adoption of the at-will rule. Clearly it did as will be discussed in part IV.A.1 below. The at-will rule possesses a life of its own, however, separate from the constitutional theories of that era.

25. Although reported cases are only a rough indication of the activity of courts, the listings in state digests do provide an indication that the at-will rule was not playing a major role in litigation by mid-century. The NEW JERSEY DIGEST, for example, lists only five cases between 1935 and 1948 under West Key Number Twenty, "Indefinite Term," in the "Termination and Discharge" section of the Master and Servant volume. Of these, one concerned New York law and the other four were disputes between unions and employees. The same key number in the NEW JERSEY 2ND DIGEST includes eleven opinions covering New Jersey law between 1977 and 1989, all of which deal with individuals' employment disputes with their employers. This figure reflects something of an undercount since West rearranged key numbers to accommodate the appearances of exceptions to the at-will rule.

26. 344 P.2d 27 (Cal. Ct. App. 1959).

the union as employer for retaliatory discharge. The employee alleged that the union had fired him for refusing to commit perjury when he was called before a state legislative committee to testify. The court held that the right to discharge an at-will employee could be limited by statute or by "considerations of public policy."<sup>27</sup>

After Lawrence Blades' pathbreaking 1967 article,<sup>28</sup> commentators increasingly criticized the rule. Other common law theories joined the public policy exception.<sup>29</sup> These changes have sharply altered the way courts apply the at-will rule. Rather than ending a case, finding that an employee has an at-will contract now merely begins the analysis, as the employee seeks to frame a claim within one of the theories outlined above. Despite these dramatic changes in the scope of the at-will rule, the rule remains, weakened but alive, in every United States jurisdiction today.<sup>30</sup>

## II. MYTHOLOGIES

The existing literature gives three types of explanations for the rise of employment at-will: (1) the at-will rule is a product of nineteenth century *laissez faire* thinking; (2) the at-will rule was a means by which capitalists prevented the new middle class of professionals from obtaining a share of capitalist profits; and (3) a combination of weak trade unions and a lack of social class distinctions in the United States produced the at-will rule.

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27. *Id.* at 27. The court cited no authority for the public policy part of its holding, simply presenting it as the at will rule itself had been presented many times: as a proposition of a simple truth needing no authority.

28. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

29. The most prominent of these are the implied contract theory, in which a limitation on the right to discharge is implied from employer statements, writings or practices (e.g. Toussaint v. Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980)); various tort theories such as intentional infliction of emotional distress, slander, libel, and the like which are based on the manner and circumstances of discharge (e.g., Agis v. Howard Johnson, 355 N.E.2d 315, 317 (Mass. 1976) (claim of intentional infliction of emotional distress where waitresses fired in alphabetical order until person responsible for the thefts was discovered)); and attempts to give content to the implied covenant of good faith and fair dealing in the employment context (e.g., Cleary v. American Airlines, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980) *overruled in part and aff'd in part*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)).

30. Even Montana, which has adopted a statutory wrongful discharge scheme, technically remains an at-will state. See MONT. CODE ANN. § 39-2-503 (1993).

### A. *Guilt by Association*

The appearance of the at-will rule in the late nineteenth century has suggested to courts and scholars alike that it was, at best, a rule appropriate to *laissez faire* capitalism.<sup>31</sup> Instead of a case-by-case approach, more compatible with the contemporaneous formal contractarian<sup>32</sup> school of legal reasoning, so the argument goes, *laissez faire* jurists chose the broad sweep of the at-will rule. Simply reciting the magic words "*laissez faire*" does not a theory make. Any philosophy which emphasizes limited government to give the widest scope to individual freedom of action, as *laissez faire* does, is incompatible with the evil with which the at-will rule is charged—overriding the intention of the parties to conclude a binding agreement. What the cry of "*laissez faire*" really represents, therefore, is a claim that the rule was an active state intervention in favor of employers rather than state neutrality.

Indeed, the less sophisticated versions of this theory simply link the at-will rule to the needs of an industrializing economy.<sup>33</sup> Since the United

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31. A representative quotation from Mary Ann Glendon and Edward R. Lev, *Changes In The Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 458 (1979), illustrates this analysis nicely: "Although this new doctrine was first asserted without analysis or judicial support by H.G. Wood in his 1877 treatise on master and servant law, it was highly compatible with prevailing *laissez-faire* notions and was readily accepted by the courts." Similar statements appear almost everywhere the rule's history is discussed. A representative case law example is Judge Holmes' dissent in *Phung v. Waste Management, Inc.*, 491 N.E.2d 1114, 1118 (Ohio 1986):

[T]he doctrine of at-will employment developed in a *laissez-faire* climate that encouraged industrial growth and strongly approved of an employer's right to control his own business. That right necessarily encompassed the right to discharge an employee-at-will without cause. Although I am well aware that today's economic climate demands industrial growth, in my view, justice requires that an employer conduct business in a lawful manner.

Judge Holmes' reasoning does little to justify the historical resonances of his name; his reliance on guilt by association arguments is not unusual.

32. The opposition of Williston is often cited as proof that the at-will rule was incompatible with other contemporary legal developments. Feinman, for example, has Williston "bemoaning the failure of the courts to adhere to true contract principles." Feinman, *supra* note 2, at 126-27. On Williston's opposition, see 1 SAMUEL WILLISTON, *CONTRACTS* § 39 (1921).

33. A slightly more elaborate version of this argument was made by the New Jersey Supreme Court in *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980). After tracing the history of the at-will rule, the court concluded:

In the last century, the common law developed in a *laissez-faire* climate that encouraged industrial growth and approved the right of an employer to control his own business, including the right to fire without cause an

employee at will. See Comment, 26 HASTINGS L.J. 1434, 1441 (1975). The twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law. Businesses have evolved from small and medium size firms to gigantic corporations in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their own businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.

*Pierce*, 417 A.2d at 509. This view is worth briefly exploring. The core contentions concerning this change are that: (i) As employers, large corporations are different from the employer of the late 1870, the small proprietor or partnership, and (ii) that the at-will rule is less suited to the employment relationship with these larger corporations.

This could mean several things. It might be that it is harder to move among jobs today, because the specific human capital requirements of skilled jobs are higher. If that is so, then the at-will rule would be more appropriate now than in the 1870s since the implicit contract between employers and employees would be stronger today.

Alternatively, it could mean that a greater weight must be given to employer's wishes when the employer is also the owner of the business. An employer in daily contact with an employee might, for example, be given more latitude in firings since an unpleasant employee would directly affect the owner's enjoyment of his business. It is difficult to see how lack of ownership alters this relationship. Employees still have close contact with their supervisors, and that contact can still be unpleasant for either. Moreover, the owners have some influence over managers, and could force them to adopt a higher degree of job security to guard against manager opportunism if they wished.

Whether employees' bargaining position compared with their employers is worse today than in the late 1800s is a question whose answer is not as clear-cut as the critical literature suggests. Violence against employees is far less common today, and a host of legal restrictions on invasions of privacy, pensions and discrimination, to name only a few areas, have provided employees with legal and administrative weapons with which to confront employers. Procedural reforms have provided employees with access to devices like class action suits that help overcome the difficulties of group action. Employees desiring union representation have available organizational tools, both legal and practical, which are beyond the worst nightmares of an employer of the late nineteenth century. While unionization has declined in recent years, the threat of unionization remains, prompting many employers to adopt personnel management techniques that attempt to provide many of the benefits of unions to nonunion employees. See, *generally*, FRED K. FOULKES, *PERSONNEL POLICES IN LARGE NONUNION COMPANIES* (1980), which conveys the clear message that a company which wishes to remain nonunion needs to treat its employees well. This same idea was repeated to the author by many managers of nonunion companies who asked not to be identified. One put it more colorfully: "Companies that get unions deserve them."

States has "finished" industrializing, they then conclude that we can dispense with the rule. Although it is difficult to find a precise explanation of the linkage, the proponents of this view argue that there is a causal connection between economic conditions during industrialization and state intervention in favor of employers.<sup>34</sup>

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The increasing proportion of employees who work for "large corporations," however defined, argues against arbitrary treatment of employees being more prevalent today since it is precisely those employers who are most likely to have instituted personnel practices that restrict the authority of line managers to fire.

Finally, the predominate industrial relations philosophy has changed, for the better, from the days of the nineteenth century "drive system." Even if the ultimate aim of companies, profit, is no different today, since World War I personnel practices have increasingly focused on the notion that preventing arbitrary treatment of employees benefits both employers and employees. The stock account of the rise and dominance of the at-will rule thus leaves a great deal to be desired.

34. The essence of this argument comes from a frequently quoted passage from FRANK TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951):

We have become a nation of employees. We are dependant upon others for our means of livelihood, and most of our people have become completely dependant upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation the substance of life is in another man's hand.

*Quoted with approval in* Kmart Corp. v. Ponsock, 732 P.2d 1364, 1372 (Nev. 1987) *abrogated by* Ingersoll-Rand Co. v. McLendon, 498 U.S. 133 (1990); *Kass v. Brown Boveri Corp.*, 488 A.2d 242, 249 (N.J. Super Ct. A. Div. 1985); *Geary v. United States Steel Corp.*, 319 A.2d 174, 176 (Pa. 1974); and *paraphrased without attribution in* *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509 (N.J. 1980). These opinions appear to have drawn the quote from Blades, *supra* note 28, at 1404.

Court's citation of Tannenbaum is only slightly more surprising that their citation of Feinman. (See note 36 *infra*). Tannenbaum, a former Wobbly and self-described ex-convict, was a sociologist/historian active between 1920 and the late 1960s. He wrote important works on the Mexican Revolution and slavery. Joseph Maier, *Frank Tannenbaum*, in 18 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, BIOGRAPHICAL SUPPLEMENT* 757-60 (David Sills ed., 1979). *A PHILOSOPHY OF LABOR*, however, expressed a view of labor, unions, and society far out of the mainstream. He concluded it by stating:

All of the charges made against the Nazi and Communist management will be made in time against any system of government control. Industrial society is too complex, many-sided, subtle, unstable, changeable, and creative to be handled by political dicta and for political considerations. Government control is unstable because it can operate only through repression. In the end either the organic groups now in unions will destroy the authoritarian government state, or the government will end by stifling

*B. Crushing the Middle Class*

Jay Feinman<sup>35</sup> offers a self-described "Marxian" analysis,<sup>36</sup> in which he argues that the at-will rule was a means through which capitalists asserted control over the new class of white collar workers. Feinman begins with the observation that the plaintiffs in employment cases were largely middle class rather than, for example, factory workers. These middle class employees, Feinman argues, presented a threat to the owners of capital.

Educated, responsible, and increasingly numerous, the middle level managers and agents of enterprises might have been expected to seek a greater share in the profits and direction of enterprises as the owners had to rely more heavily on them with the increasing size of business organizations. But the employment at will rule assured that as long as the employer desired it (and as long as the employee was not irreplaceable, which was seldom the case) the employee's relation to the enterprise would be precarious. An effective way to assert the owners' control and their right to management and profits and a clear division between owners and non-owners of capital was a legal declaration that the employees had no interest in the firm in the form of employment tenure or a right to a long period of notice. So the legal formula conformed to the economic necessities and to the beliefs of

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the industries and ultimately disintegrating them.

The trade union is the real alternative to the authoritarian state. The trade-union is our modern "society," the only true society that industrialism has fostered. As a true society it is concerned with the whole man, and embodies the possibilities of both freedom and the security essential to human dignity. The corporation and the union will ultimately merge in common ownership and cease to be a house divided. It is only thus that a common identity may once again come to rule the lives of men and endow each one with rights and duties recognized by all.

TANNENBAUM at 198-99. It is doubtful that the Nevada court in 1987, for example, was familiar with the context of its quotation.

35. Feinman, *supra* notes 2-3.

36. Feinman, *supra* note 2, at 119 n.5. Feinman's Marxian approach has not kept some courts from citing his work on the history of the at-will rule, suggesting either a catholic approach to social science on the part of appellate judges or that his article is cited without being read. *See, e.g.,* Magnan v. Anacarda Indus., Inc., 479 A.2d 781, 784 (Conn. 1984); Campbell v. Eli Lilly & Co., 421 N.E.2d 1099, 1103 (Ind. 1981) (Hunter, J., dissenting); Wiley v. Missouri Pac. R.R., 430 So.2d 1016, 1021 (La. Ct. App. 1982); Sides v. Duke Hosp., 328 S.E.2d 818, 824 (N.C. Ct. App. 1985); Burk v. Kmart Corp., 770 P.2d 24, 26 n.3 (Okla. 1989); Sheets v. Knight, 779 P.2d 1000, 1005 (Ore. 1989); Darlington v. General Elec., 504 A.2d 306, 309 (Pa.Super. 1986); and Banas v. Matthews Int'n Corp., 502 A.2d 637, 645 n.6 (Pa. Super. Ct. 1985); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 837, n.2 (Wis. 1983).



the owners in the existence of and the need for an industrial elite of owners of capital with absolute control of their businesses.<sup>37</sup>

Under Feinman's theory, the at-will rule served two purposes for capitalists. First, it helped deflect a challenge to the legal rights of capitalists by the emerging managerial/professional class. Second, the at-will rule enabled employers to discharge employees in economic downturns, shifting the risks of macro-economic uncertainty to employees.

### *C. Social Class and Weak Unions*

Sanford Jacoby<sup>38</sup> derives his analysis from comparison of the rules for interpreting default contracts in the United States and Britain. He argues that the emergence of the at-will rule in the United States while Britain continued to follow the older rule of a presumed term can be explained by the lesser degree of class prejudice in the United States and the stronger relative position of British trade unions.

Briefly stated, the argument is this: British courts sought to protect white collar employees because of their greater class status; they did this by offering those employees a higher degree of job security through long notice periods. At the same time, British trade unions sought shorter contracts to prevent employers from obtaining criminal enforcement of duration and notice clauses.<sup>39</sup> Because British unions were stronger than their United States counterparts, capitalists in Britain preferred a rule presuming a term because it allowed capitalists to take advantage of the criminal enforcement provisions. This combination of employer interests and social prejudice gave British white collar employees the protection of a presumed term as a byproduct of the larger struggle between employers and unions.

### *D. A Court Centered Theory*

Although the three theories outlined above differ in many respects, they all share a common flaw. Employment at-will was primarily a common law rule adopted by state courts. In attempting to explain the behavior of a specific institution, the most natural starting point is to consider whether the features of that institution played a role in determining the outcome. None of the theories described above does so; with minor editing each might explain

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37. Feinman, *supra* note 2, at 133.

38. Jacoby, *supra* note 2.

39. Such criminal enforcement was unavailable in the United States.

the behavior of the legislative or executive branches as easily as it purports to explain the behavior of the judicial branch.<sup>40</sup>

Courts as institutions differ from legislatures and executive branch agencies in many respects. First, judges have less control over their institution than do legislators or executive branch officials. Judges can manipulate the issues brought before them, but they must begin with the facts and issues presented by the parties. One of the main control mechanisms judges possess is the relatively crude one of defining what types of claims may be brought before them. Second, although judges often frame their decisions in broad terms (i.e. "indefinite employment contracts are at-will contracts"), the decisions must relate to the facts in specific cases. Not only must the decision resolve the issue in the case before the court, the case itself influences the decision through the facts it presents. Finally, there are two sets of decision makers in the type of cases where the at-will rule arose: judges and juries. When judges decide the aspects of cases reserved to them, they do so in light of the effects that their decisions will have upon the distribution of authority between judges and juries. Where they view juries as unreliable, for example, judges may seek to impose a legal barrier which gives the judiciary the ability to screen cases.

The at-will rule appeared initially in cases where the parties disagreed over the term of a contract. Although there was an infinite variety of possible rules and results, the various choices' consequences for the courts were quite different. Under the at-will rule, the court had only to decide that the contract was indefinite and the case was over. Under a presumption of a fixed term of any length, on the other hand, the court would then be faced with additional questions.<sup>41</sup>

As I will describe in more detail below, there are many reasons to believe that the at-will rule met the needs of the courts in the late nineteenth century better than the alternative rules did. This explanation has the virtue of being based on the institution whose decisions we wish to explain. It has the greater

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40. I will set out in greater detail my explanation for the rise of employment at-will in part IV.B and part V. At this time, I will provide a capsule description before beginning to present the facts which can be used to evaluate the various theories. Although the state of the literature precludes a formal model of the judicial process, it is possible to try to include institutional features of the judicial system in the explanation and to compare theories with those features.

41. Once a term existed, the court would have to decide whether an implied term existed which justified discharge before the end of the term. *See, e.g.,* *Leatherberry v. Odell*, 7 F. 641 (C.C.W.D.N.C. 1880) (implied term that employee competent to perform duties for which employed); *Phoenix Mutual Ins. Co. v. Holloway*, 51 Conn. 310 (1883) (implied term that will act in employee's interest and not steal from employer); *Hughes v. Gross*, 43 N.E. 1031 (Mass. 1896) (noting implied right to discharge for cause).

value of not requiring an additional explanation of why a default contract interpretation rule would matter in the economy or political society at large where more direct means of asserting economic or social class interest existed.

The United States' economy became a national economy during the late nineteenth century.<sup>42</sup> The geographic spread of economic activity increased, bringing with it a greater need to delegate responsibility to employees located away from firms' primary locations. The development of more advanced production techniques and more complex technology also increased the need for delegation of decision making authority to mid-level employees, such as engineers, salesmen, and managers. Providing employees with greater discretion enabled firms to operate more efficiently, but also created greater opportunities for employer-employee conflicts concerning the exercise of that discretion.

Courts were, and are, particularly ill-suited to decide such disputes. A dispute over the effects on a firm of a salesman's publicly consorting with "disreputable women,"<sup>43</sup> for example, is not one which can be objectively resolved. Because the evidence was often limited to the conflicting statements of the parties, resolution of the disputes was difficult. Even a cursory reading of judicial opinions from the period demonstrates that judges frequently found themselves disagreeing with juries' decisions but without the procedural tools to correct the decision.

The attraction of the at-will rule for the courts was that it took a difficult class of cases and removed them from juries without requiring the court to resolve conflicting testimony concerning employee performance. By shifting the initial inquiry to the issue of contract duration, courts gave themselves a gatekeeper through which they could control the exercise of jury discretion. The rise of the at-will rule was not, therefore, the response of a compliant judiciary to the demands of its capitalist masters. It was the development of an institutional mechanism which enabled courts to control cases through shifting claims away from juries where judges did not view juries as reliable.

### III. ADOPTION

The industrialization, Feinman, and Jacoby theories described above neglect an important source of information: The pattern of adoption among states. Besides expanding the number of data points beyond the two provided by the United States and Britain, examining the pattern of adoption among states enables empirical evaluation of some aspects of the theories described.

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42. See part V *infra* for a detailed discussion and citations for these points.

43. *Gould v. Magnolia Metal Co.*, 108 Ill. App. 203 (1903) *aff'd* 69 N.E. 896 (Ill. App. Ct. 1904).

*A. How States Adopted the At-Will Rule*

States not only adopted the rule at different times, they varied in *how* they adopted the at-will rule. Contrary to the conventional view of employment at-will as solely a common law development, several states adopted a weak version of the rule as part of a general codification of the common law. Among the forty-six jurisdictions which adopted the at-will rule through the common law, there was also variation in the type of case which led to the rule. The oft-cited *Payne* decision from Tennessee, for example, was not an employment case but a decision in a suit for tortious interference with contract.<sup>44</sup> Indeed, only about half the common law adoptions occurred as a result of an employer-employee dispute over a discharge. The remainder did so in a wide range of fact situations ranging from a mineral purchase contract<sup>45</sup> to an injunction action in a seniority dispute.<sup>46</sup>

I begin with a simple classification of the opinions of the courts adopting the rule through the common law process. Although it would be a mistake to attribute too much to a simple classification of the cases, such a classification does reveal some interesting patterns: First, only nine of the common law adopter opinions cite Wood's treatise. Although this in part reflects only the pre-Wood adoption in some states and the adoption long after Wood's treatise was no longer current in others, only a third of the common law adopters between 1880 and 1900<sup>47</sup> cited Wood. Second, the earliest adopters generally cite no authority. Apart from these, however, most adopting opinions cite numerous out-of-jurisdiction opinions from a geographically wide range of states.<sup>48</sup> Other than citations, there is little attempt to support the adoption of the rule with arguments or analysis—usually the rule is simply stated without consideration of alternatives. Third, adoption was not controversial in most cases. Only three opinions were not unanimous; of those, two had but one judge dissenting. Finally, the great majority of these cases reached the appellate court on appeal from a jury verdict.

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44. See note 11 *supra*.

45. *Christensen v. Pacific Coast Borax Co.*, 38 P. 127 (Or. 1894).

46. *Boucher v. Godfrey*, 178 A. 655 (Conn. 1935).

47. Wood's first edition was published in 1877 and his second edition in 1886. I chose 1880-1900 as the period on the belief that that period reflected the useful life of Wood's treatise. See part VI.A *infra*, for a discussion of the differences between the first and second editions of the treatise.

48. At least some of these citations appear to be based on readings of digest headnotes rather than the actual opinions. See e.g., *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 557 (1887) (incorrectly citing *Haney v. Caldwell*, 35 Ark. 156 (1879) in support of the rule.) See Appendix A for a discussion of this citation.

The picture of adoption painted by these opinions is quite different from the stereotype of the rise of employment at-will.<sup>49</sup> Wood fades to relative insignificance. Not only was he not the first to state the rule, but his treatise does not appear to have been particularly important in persuading judges of his conclusion.<sup>50</sup> The absence of controversy suggests there is less than modern critics want to find in the adoption of the rule.<sup>51</sup> The almost complete lack of dissent from the rule's adoption is a powerful indicator that the rule was seen as relatively unimportant and/or obvious. Although one can always retreat to claims of ideological conformity, it is difficult to credit such a claim when it concerns a period from 1851 well into the twentieth century and spans states as diverse as Mississippi and New York. Also, all of the judges<sup>52</sup> who voted to adopt the rule were not cut from the same political cloth or woven from the same socio-economic thread.<sup>53</sup>

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49. The stereotype has been built in a number of ways. One problem with some prior research is that it has focussed on a single state (Feinman, for example, concentrated heavily on New York law) or on a tiny subset of the opinions actually adopting the rule. Opinions after adoption often expanded on the rule, adding, for example, the mutuality rationale so often criticized today. Few of the adopting opinions contained such arguments, apparently treating the rule as simply the natural default rule for contracts.

50. Of course the courts which do not cite Wood might have relied upon his treatise, but there is no reason to think they would do so without citation since the treatise was well regarded (*see* note 212 *infra*) and other treatises were cited.

51. Using a sample of opinions drawn from sixteen states, an earlier study found that overall dissent rates were slightly over eight percent for the period 1870-1900 and increased after that to as much as fifteen percent in 1940-1970. Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 788 (1981). Given the length of the period of adoption, a rough calculation suggests one would expect to find dissents in between eight and twelve percent of the opinions adopting the at will rule, or three to six opinions. Since dissents appear in only two of the opinions, this reinforces the notion that this was not a controversial doctrine at the time of adoption.

52. Only four dissenting votes occurred in the opinions adopting the rule.

53. On the diversity of backgrounds in the South, *see* Kermit L. Hall, *The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920*, in *AMBIVALENT LEGACY* (David J. Bodenhamer and James W. Ely, Jr., eds. 1984). On the diversity of state supreme court judges from a slightly later period, *see* Robert A. Kagen et al., *American State Supreme Court Justices, 1900-1970*, 1984 AM. B. FOUND. RES. J. 371 (1984).

*B. When States Adopted the Rule*

Table I lists the adoption years chronologically.<sup>54</sup> Table II presents the year of adoption for each state.

**Table I: Adoption of Employment At-Will by Decade**

<u>Pre-1870</u>	<u>1900-1909</u>
Louisiana (1808)	Florida (1901)
Maine (1851)	Kansas (1909)
Mississippi (1858)	Michigan (1904)
	Utah (1909)
	Virginia (1906)
<u>1870-1879</u>	<u>Post-1910</u>
California (1872)	Arizona (1932)
Colorado (1876)	Connecticut (1935)
Illinois (1874)	D.C. (1921)
Dakota Territory (1877)	Idaho (1968)
Wisconsin (1871)	Iowa (1910)
<u>1880-1889</u>	Massachusetts (1920)
Georgia (1889)	Minnesota (1936)
Maryland (1887)	Nebraska (1918)
Tennessee (1884)	Nevada (modern)
Texas (1888)	New Jersey (1948)
<u>1890-1899</u>	New Mexico (1953)
Alabama (1891)	Oklahoma (modern)
Arkansas (1897)	South Carolina (1923)
Delaware (1899)	Vermont (1923)
Indiana (1897)	Washington (1928)
Kentucky (1896)	West Virginia (1913)
Missouri (1895)	Wyoming (1937)
Montana (1895)	
New York (1895)	
North Carolina (1897)	
Ohio (1891)	
Oregon (1894)	
Pennsylvania (1891)	
Rhode Island (1897)	

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54. Appendix A provides a citation and short explanation of why the particular decisions were considered as the first decision for each state.

**Table II: Adoption of Employment At-Will Rule by State**

Alabama	1891	Montana	1895**
Arizona	1932	Nebraska	1918
Alaska	modern*	Nevada	modern*
Arkansas	1897	New Hampshire	modern*
California	1872**	New Jersey	1948
Colorado	1876	New Mexico	1953
Connecticut	1935	New York	1895
Delaware	1899	North Carolina	1897
D.C.	1921	North Dakota***	1877**
Florida	1901	Ohio	1891
Georgia	1889	Oklahoma	modern*
Hawaii	modern*	Oregon	1894
Idaho	1968	Pennsylvania	1891
Illinois	1874	Rhode Island	1897
Indiana	1897	South Carolina	1923
Iowa	1910	South Dakota***	1877**
Kansas	1909	Tennessee	1884
Kentucky	1896	Texas	1888
Louisiana	1808**	Utah	1909
Maine	1851	Vermont	1923
Maryland	1887	Virginia	1906
Massachusetts	1920	Washington	1928
Michigan	1904	West Virginia	1913
Minnesota	1936	Wisconsin	1871
Mississippi	1858	Wyoming	1937
Missouri	1895		

\*not formally adopted, modern cases assume rule

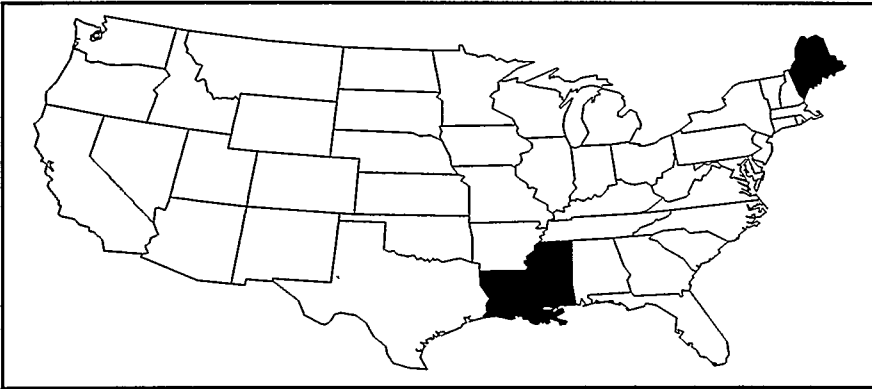
\*\*adopted by code

\*\*\* In 1877, North and South Dakota were the "Dakota Territory"

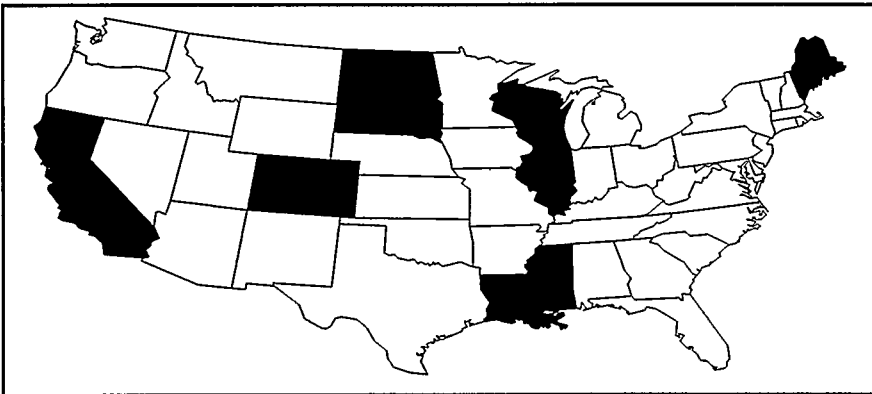
Two groups of these states' adoption of the at-will rule deserve extended discussion: the early common law adopters and the civil code states. Before turning to these, however, the general pattern of adoption is worth brief

mention. Figure 1 through Figure 5 provide snapshots of the rule’s status for each decade from 1870 to 1908. The geographic pattern of adoption calls the industrialization hypothesis into question as the rule’s adoption moved generally from the west to the south and midwest and only into the more heavily industrialized northeast after several decades.

**Figure 1: Adoption of the At-Will Rule, 1870**

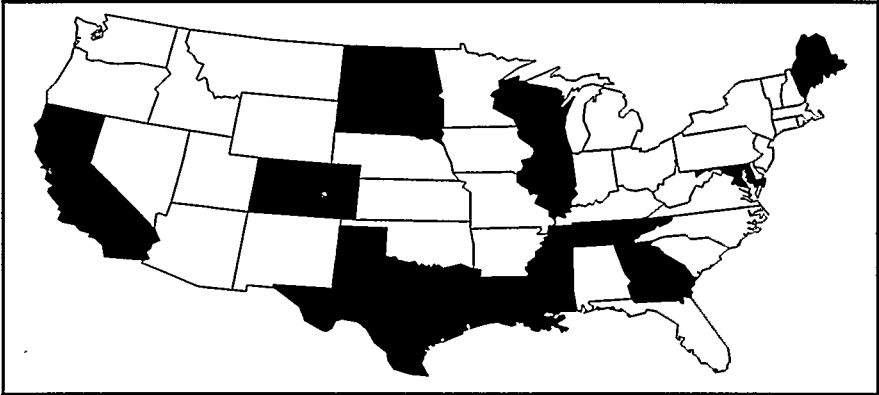


**Figure 2: Adoption of the At-Will Rule, 1880**

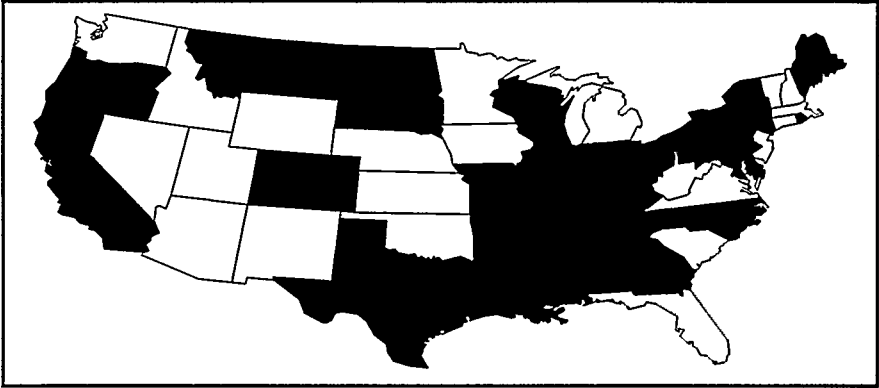




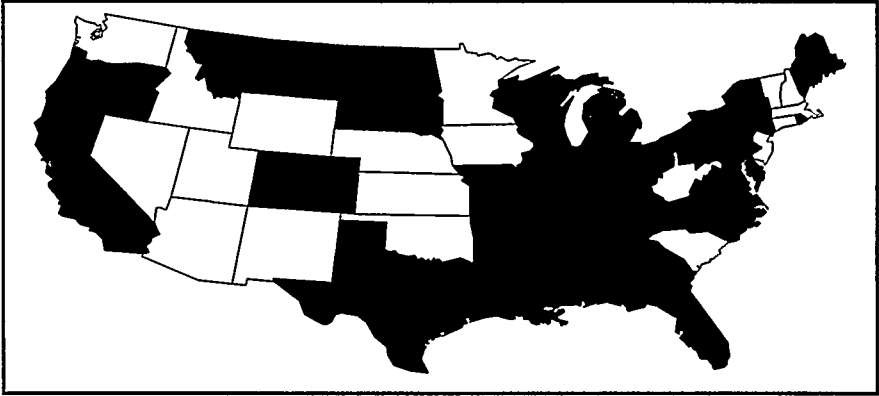
**Figure 3:** Adoption of the At-Will Rule, 1890



**Figure 4:** Adoption of the At-Will Rule, 1900



**Figure 5:** Adoption of the At-Will Rule, 1908



Besides counting states, one can measure the spread of the rule by the proportion of the economy and population in states which had adopted it. Table III shows the percentage of the United States totals of several such measures in states which had adopted the at-will rule by decade: the measures used are total labor force, manufacturing wages, manufacturing establishments, total capital invested in manufacturing, and total population.<sup>55</sup>

**Table III: Economic Coverage of the At-Will Rule**

Measure of Coverage	Percent of the Economy Covered by Rule in:				
	1869	1879	1889	1899	1909
Total Wages Paid	2.68	12.20	18.18	77.15	75.31
Total Population	5.66	17.39	29.40	69.36	79.30
Number Mfg. Establishments	3.95	14.02	21.68	70.77	80.68
Total Capital Invested in Mfg.	2.97	12.27	19.91	70.22	77.53
National Labor Force	6.27	16.76	27.14	70.15	79.79

Table III clearly shows that the rule's economic or demographic dominance before 1890 was questionable. Only during the 1890s did the rule pass the halfway mark in each of these measures.<sup>56</sup> Much of that spectacular growth is due to adoption in Pennsylvania (1891) and New York (1895), which together accounted for nineteen to thirty-three percent of the U.S. economy in 1890, depending on which measure is used.

The adoption pattern itself casts some doubt on the industrialization and Feinman hypotheses. As the maps show, the rule primarily spread from the West and South to the East. Its spread through the economy further weakens the industrialization hypothesis, as the rule attains majority status only in the mid-1890s and coverage of more than two thirds of the economy in 1900, well after many of the significant industrial struggles between capital and labor.

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55. Data from SIMON KUZNETS AND DOROTHY SWAINE THOMAS, *POPULATION REDISTRIBUTION AND ECONOMIC GROWTH, UNITED STATES, 1870-1950* (1960). See part IV.A *infra* for more detailed descriptions of these measures.

56. The rule passed the fifty percent mark around 1895 by four of the five measures used in Table III Economic Coverage of the At-Will Rule. By total wages paid, the rule passed the fifty percent mark in 1891.

## 1. The Early Common Law Adopters

Maine (1851) and Mississippi (1858) were the earliest common law adopters.<sup>57</sup> The Maine decision is a one-paragraph report, together with the reporter's description of the facts, of an oral opinion. The plaintiff had been hired in Bath but was to work in Hallowell. Before the plaintiff had travelled to Hallowell, however, the defendant postponed the start of the contract. The plaintiff never went to Hallowell. The trial judge instructed the jury that they might award the plaintiff damages for the time he spent waiting in Bath for instructions to go to Hallowell. The plaintiff won and the defendant appealed, objecting to the jury instruction. The opinion in its entirety states:

An infirmity in this contract is, that it fixed no time during which the plaintiff's services should be rendered to the defendant. Suppose the plaintiff had gone to Hallowell, and tendered his services, there was nothing to prevent the defendant from discharging him at the end of a single day. In such a contract there is no value. Exceptions sustained.<sup>58</sup>

The brevity, lack of citation, and oral delivery are all common features of cases in volume 34 of Maine Reports.

The Mississippi High Court of Errors and Appeals applied the at-will rule for the first time in *Butler v. Smith & Tharp*.<sup>59</sup> *Butler* presented a more complex set of facts than the Maine case and several legal issues,<sup>60</sup> and resulted in a much lengthier opinion.<sup>61</sup> The case was an action for replevin of goods which the defendant refused to deliver to the plaintiff. The defendant's business was to receive goods shipped to Vicksburg and to store them until the owners could arrange for their delivery. The plaintiff and the defendant disagreed over the defendant's right to charge for the service in this instance.

The main issue which concerns us is the interpretation of the parties' agency contract authorizing the plaintiff to receive the goods and charge according to a schedule of rates. The plaintiff contended that it had canceled the contract. In considering the effect of the attempt at cancellation, the court found that there was

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57. Pennsylvania is sometimes listed as an early adopter based on *Coffin v. Landes*, 46 Pa. 426 (1864), which held an agency contract terminable at will. That case turned on the nature of the particular contract and so cannot be considered to have adopted a default rule. See Appendix A for a more detailed discussion.

58. *Blaisdell v. Lewis*, 32 Me. 515, 516 (1851).

59. 35 Miss. 457 (1858).

60. The reporter characterized the appellee's brief as "elaborate." *Butler*, 35 Miss. at 460.

61. Over five pages of actual opinion plus four pages of notes by the reporter.

nothing in the transaction to take it out of the general rule, that an agency to do particular services from time to time, to be paid for as the services are rendered, and without any agreement as to the time of its continuance, is determinable at the pleasure of either party.<sup>62</sup>

The case does not, of course, deal with the interpretation of an *employment* contract but with an *agency* contract. This is not a significant distinction in this case. One reason to attribute the at-will rule in Mississippi to *Butler* is that the Mississippi courts do so. The first major case to deal with the construction of an indefinite employment contract, *Echols et. al. v. New Orleans, Jackson & Great Northern Railroad Company*,<sup>63</sup> cited *Butler* and grouped all contracts with indefinite time terms together as unenforceable.<sup>64</sup> Modern Mississippi opinions also continue to cite *Butler*,<sup>65</sup> as do federal courts applying Mississippi law.<sup>66</sup> What the courts in Mississippi do is not conclusive, however, except in Mississippi.<sup>67</sup> *Butler* satisfies other measures of generality as well.

At the time of *Butler* employment was often seen simply as a type of agency.<sup>68</sup> David Dudley Field, for example, in drafting his proposed civil code for New York included provisions for an at-will rule in his first public draft and listed as his source Story's agency treatise.<sup>69</sup> The theories of the codification movement, the *Code Napoleon*, and the prevailing mode of legal

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62. *Butler*, 35 Miss. at 464.

63. 52 Miss. 610 (1876).

64. *Id.* at 614.

65. *See, e.g., Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874, 875 (Miss. 1981).

66. *See, e.g., Samples v. Hall of Mississippi, Inc.*, 673 F.Supp. 1413, 1416 (N.D. Miss. 1987) ("Since 1858, Mississippi has followed the rule . . . .")

67. The courts may be attempting to hide an innovation in the law or bolster the pedigree of a questionable doctrine. They could simply be making a mistake. Perhaps we are smarter or possessing of greater quantities of some other virtue, such as courage, and so can see a distinction which judges close to Mississippi law fail to notice. The literature critical of the at-will rule has taken on a tone of impatience with the recalcitrance of state courts which fail to recognize the virtues of the arguments made by the critics and abandon the at will rule. *See St. Antoine, supra* note 9, at 81 (referring to "timid" courts unwilling to alter the at-will rule.)

68. This of course continues to be at least partially true. *See the RESTATEMENT (SECOND) OF AGENCY*, § 2 cmt. a.

69. Section 830 of the 1862 draft stated: "An employment having no specified term may be terminated at the will of either party on notice to the other." Field cited Story's Sections 462, 476, and 477. *See Morriss, supra* note 8, Chapter 2: *An Empirical and Not-so-Empirical Reassessment of the Rise of Employment At Will*, Part C for a detailed look at the Field codes.

thought supported a view of the law as governed by broad general rules.<sup>70</sup> Given the structure of the nineteenth century economy at midcentury and the broad view of legal rules' generality, the differences between agency and employment were not likely to appear significant to contemporary lawyers. Others outside Mississippi viewed *Butler* as applying to employment contracts. The Centennial Digest published in 1902 listed *Butler* as standing for the at-will rule,<sup>71</sup> as did West Publishing Company's Mississippi Digest,<sup>72</sup> published in 1964.

Both Mississippi and Maine had recognized the principle that some contracts with indefinite terms were terminable at-will. These two cases show more than that the at-will rule was born before 1877. First, they suggest that adoption even as early as the 1850s was not controversial. Neither court felt compelled to support its statement with argument or authority but simply reached what they treated as an obvious conclusion. Second, the Mississippi opinion puts the at-will rule into a broader social context. As the nature of employment changed over the century, courts sought to fit the new employer-employee disputes into familiar categories. Mississippi turned to agency law as a model, suggesting a natural explanation for why both later courts and treatise writers like Wood found the at-will rule an obvious proposition.

## 2. The Civil Codes

Codification was an important nineteenth century intellectual movement in both Europe<sup>73</sup> and the United States. During the nineteenth century<sup>74</sup>

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70. See RESTATEMENT OF AGENCY (SECOND) § 2. The first report of the Code Commission, for example, reported that a unified approach was needed to resolve the contradictions in the law. FIRST REPORT OF THE COMMISSIONERS OF THE CODE 6 (1858), discussed in J.O. Muus, *The Origin of the North Dakota Civil Code*, 4 N.D. L. REV. 103, 114 (1937). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 14, 17 and 40 (1992). ("Agency law . . . throughout the nineteenth century . . . sought to bring under one heading both the law of master and servant and the law of principal and agent.")

71. See 34 CENTURY EDITION OF THE AMERICAN DIGEST 426, Master and Servant § 19[a] (1902) ("A contract of employment for an indefinite period may be terminated by either party at any time.")

72. 10A MISSISSIPPI DIGEST 36. The digest summarizes *Butler* as: "Miss. 1858. A contract of employment for an indefinite period may be terminated by either party at any time."

73. In England, Jeremy Bentham, for example, was a major proponent of codification, coining the word "codify." Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 36 (1990). France's adoption of the Code Napoleon in the early part of the nineteenth century launched a codification movement across much of Europe. The Code Napoleon's influence spread with Napoleon's

codification debates in the United States, five states<sup>75</sup> enacted weak versions

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military accomplishments but did not recede with his defeats. Austria, Switzerland, Spain, Portugal, and several of the German and Italian states all adopted at least partial civil codes during the nineteenth century, as did Japan, Ottoman Turkey, and British India. How did they treat indefinite employment contracts? To the extent I have been able to discover provisions which said anything about the term of employment contracts, most civil law codes outside the United States simply required the contract itself to state a definite term. None directly addressed the question of indefinite term employment contracts. THE FRENCH CIVIL CODE (as amended up to 1906) (trans. E. Blackwood Wright, 1908), Art. 1780 ("The services of a person can be enjoyed either for a definite time or for a definite undertaking.") Even the Anglo-Indian Code, drawn up in the late 1880s for British India, criminalized only certain specific breaches of employment contracts, but did not address the issue of the interpretation of indefinite contracts directly. C.P. ILBERT, THE ANGLO-INDIAN CODES (1887). Sections 490-492 criminalized breaches of contracts of service of conveyance of persons or goods, contracts to attend to those incapable of attending to themselves, and contracts to serve at a distant place to which the master has conveyed the servant at his own expense. See C.P. ILBERT, *Indian Codification*, 5 L. Q. REV. 347 (1889) and James F. Simmons, *Codification in India and England*, 18 FORT. REV. 644 (1872) for general descriptions of Indian codification.

74. Even before general codification, the at-will rule had surfaced in banking statutes. National banks and many of their state counterparts operated then (and today) under the strongest version of the at-will rule, one which precluded other types of contracts for certain bank officers. The National Bank Act of 1864 required banks organized under it to: "elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places . . . ."

Similar language was in the two previous years National Currency Active Act. February 25, 1863, C. 58 § 11, 12 Stat. 665, 668 (National Currency Act) "to remove such president, cashier, officers, and agents at pleasure . . . ." Act of June 3, 1864, ch. 106 § 8, 13 Stat. 101 (National Bank Act). The modern version of this provision is contained in 12 U.S.C. § 24 (Supp IV 1992) and the Federal Home Loan Act, 12 U.S.C. § 1432 (a) (1993). Similar provisions were present in state banking statutes as early as 1806. New York passed the first general banking statute in 1838 and other states soon followed. Prior to 1838, chartering a bank required a special act of a state legislatures (excluding, of course, the First and Second Banks of the United States). Many of these contained at-will provisions. See e.g., 1 RESOLVES AND PRIVATE LAWS OF THE STATE OF CONNECTICUT 86-87 (1834); 3 THE STATUTE LAW OF KENTUCKY (William Littell, Ed.) Chapter CCCXCIII § 11 (1806) ("Cashier, and such other offices and servants under them as may be necessary . . . , removable at pleasure . . . ."); LAWS OF THE STATE OF NEW YORK passed at the Sixty-First Session of the Legislature, Ch. 260, § 18 (1838) (included "at pleasure" language); 1810 S.C. ACTS 14-15; BANKING BEFORE THE CIVIL WAR 5-7 (Deane Carson ed., 1963).

75. California, Georgia, Louisiana, Montana, and North and South Dakota.

of the at-will rule. In a sixth state, Louisiana, a civil law heritage led to a development which paralleled the common law's adoption. The code states' experiences allow one to draw several conclusions.<sup>76</sup>

First, the presence of a weak version<sup>77</sup> in civil codes of the four states<sup>78</sup> which based their codes on David Dudley Field's 1865 draft New York civil code demonstrates that employment at-will was not a construct of Horace Wood's imagination. The presence of a strong version in Field's first draft in 1862<sup>79</sup> strengthens the conclusion that during the time states adopted these codes legal reformers did not consider at-will contracts to be particularly ill-suited to American economic life. Field's choice of the weak version of the at-will rule in his 1865 draft over the strong version from his 1862 draft does not seem overly significant. The reason for Field's changes are lost to modern legal historians, but the appearance of the additional case citations<sup>80</sup> suggests that Field may simply have modified his views of the state of the law in 1865.<sup>81</sup>

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76. See Morriss, *supra* note 8, Chapter 2 for a full discussion of the codification of the at-will rule.

77. The weakness came from the exclusions to the rule's scope. The rule itself, section 1029, read:

An employment having no specified term may be terminated by either party, on notice to the other, except where otherwise provided by this title.

The exclusions were in two new provisions added to the 1865 draft, Sections 1035-36, which read:

1035. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.

1036. In the absence of any agreement as to wages, a domestic servant is presumed to be hired by the month; a clerk, or other servant not merely mechanical, or agricultural, by the year; and other servants for no specified term.

These new sections greatly restricted the reach of section 1029.

78. California, Montana, and North and South Dakota.

79. Section 830 of the 1862 draft, which lacked the exclusion sections quoted in note 77.

80. To Section 1029 were added citations to: *Hathaway v. Bennett*, 10 N.Y. 108 (1854); *Ward v. Ruckman*, 34 Barb. 419 (N.Y. App. Div. 1861); and *Beeston v. Collyer*, 4 Bing. 309 (1827). The new sections were supported by citations to: *Davis v. Marshall*, 4 Law Times (N.S.) 216 (1861); 6 H. & N. [Am.ed.] 916 (§ 1035) (1861) and *Fawcett v. Cash*, 5 B. & Ad. 904, 110 E.R. 1026 (1834) (§ 1036).

81. For all the discussion in the four western code states about the relative merits of codes and the common law, the primary motivation for adoption of a code in each state seems to have been the absence of law in these new, and for the most part, sparsely settled territories. California was not, of course, sparsely settled in 1872. Its

Second, the adoption of the weak version by the four Field code states is also significant for what it suggests was not true. One would expect that the reasons suggested by the at-will critics for judicial adoption would apply with greater force to legislative adoption. Railroads, for example, were both frequent defendants in employment actions and were not reticent about explaining their interests to state legislatures. Since the Dakotas and Montana in particular were concerned with attracting railroad capital,<sup>82</sup> what better place for a legislator to earn his keep with a railroad than in influencing a

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population was 560,200 in 1870, larger than twenty-five of the forty-eight states and territories. Everett S. Lee, *Migration Estimates*, in 1 KUZNETS AND THOMAS, *supra* note 55, Table P-4A, at 349. However, there was the additional problem of a conflicting morass of Spanish, Mexican and United States law, and the codes solved the problem, at least to some extent, of determining which law was to apply. Too much law created a problem similar to the problem of too little law in the other territories.

By adopting civil codes, these jurisdictions were able to fill the void in a short time. The choice of the particular rules for interpreting indefinite employment contracts does not appear to have been a matter of much importance in the discussion of the codes. It is likely that the rules chosen were not those thought to be especially well suited to each jurisdiction's legal and economic conditions but rather simply whatever was present in the Field draft or earlier adopters civil codes. We cannot therefore interpret adoption as demonstrating that a particular provision was "the best." For an excellent discussion of how the rules chosen to govern covenants running with the land were *not* the optimal ones for Montana's conditions, a matter much more likely to have been important to the Montana Legislature than the interpretation of indefinite employment contracts, see Natelson, *supra* note 73.

82. For example, the first Dakota Territorial Assembly held up incorporation of a railroad until every member of the Assembly had been made a partner. HOWARD ROBERTS LAMAR, DAKOTA TERRITORY, 1861-1889, at 88 (1956). Lamar describes the role of railroads in territorial Dakota politics as "the touchstone to wealth and prosperity for everyone." *Id.* at 126. He concludes:

[i]t would be difficult to exaggerate the vital role the railroad played in shaping the Territory's political and economic history. The struggle to secure a railroad is, in fact, a key and binding factor which gives meaning to Dakota politics for the years 1869-1874.

*Id.* at 127. Promoters of the first railroad to actually reach the territory included the "foremost territorial officers." *Id.* at 133. He later concludes "the railroad promoters and builders were synonymous with the political leaders and territorial offices in Dakota." *Id.* at 143. In the case of Dakota, the railroad had direct political influence since many members of the legislature were employed by it. For example, of the seven legislative seats for northern Dakota, three were held by land agents, one by a railroad agent, one by a farmer, and two by merchants. *Id.* at 191-92. The railroad's supporters become known as the "Railroad Combination." *Id.* at 192, 204 (influence of the lobbyists in veto of call for constitutional convention because railroads preferred more lenient territorial railroad laws).



minor provision of the civil code? A small change there could easily pass unnoticed, yet, if one is to believe Feinman, bring great rewards to the legislator's railroad clients.<sup>83</sup> The absence of strong party organizations or ideological divisions, leading to patronage-based governments, would have made such acts even easier.<sup>84</sup> The failure to seize such a golden opportunity suggests that adoption was not an important part of the business agenda.

Third, the history of the code provisions makes it clear that the states which adopted versions of the at-will rule first through civil codes did so under circumstances which are not comparable with the common law adopters. Not only were the codes the result of commissions' study and legislative review and acceptance, but the employment provisions also represented only a tiny portion of the massive codes rather than the central holding of a case. For this reason, the five code states will be excluded from the empirical analysis in part IV below.

### *C. How to Ask Why the Rule Was Adopted*

There is no well-developed literature on the courts comparable to public choice analysis of legislatures or regulatory capture analysis of executive agencies. No consensus exists, for example, on what objective function a judge might be maximizing or on how other pending cases might influence appellate judges' votes. Not only is there no consensus, there are no plausible theories to consider. Constructing a formal model is, therefore, not possible. One can, however, do better than mere speculation by considering the nature of courts as institutions, the structure of the bar in the period being studied, and the common law process which brought about the adoption of the rule. Inquire into the adoption of common law rules must focus on institutional features of the courts.

#### 1. Courts as Unique Institutions

Courts, and appellate courts in particular, differ significantly from legislatures, agencies, or markets. Judges work in small groups, work in a significant degree of isolation from the individuals whose cases they decide, and distill general principles of law into specific holdings. Except where the judges accept bribes or fail to recuse themselves from cases which affect their personal interests, judges tend not to have the opportunity to directly profit from their actions. How then are we to approach the problem of determining how they will behave?

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83. Or, in the case of Dakota, at least, to the legislator himself.

84. See, e.g., LAMAR, *supra* note 82 at 145-46 (Dakota).

First, there are general styles of analysis which have been common during different periods of United States legal history. Although examining these styles does not explain why courts adopted the style, one can use them to explain why judges writing in a particular style favored a particular rule.

Second, judges make choices which affect their own work within the institution. Judges in the United States share decisionmaking authority with juries to a far greater extent than do judges in any other Western country. This sharing of power is at times an uneasy one. Judges, particularly appellate judges, may disagree with juries' factual determinations, as was often the case in late nineteenth century employment cases.<sup>85</sup> These disagreements are hardly surprising; juries exist, in part, because of society does not wish to give judges exclusive authority over the disposition of cases.<sup>86</sup> Judges can "correct" juries either *ex ante*, by adopting rules that create legal barriers which a case must overcome before it reaches a jury, or *ex post*, by creating methods of review of jury decisions.

The United States legal system favored the former method over the latter in the late nineteenth century, and continues to do so today. Setting aside a jury verdict on insufficient evidence grounds, for example, requires the court to find that there is no evidence to support the victorious party's position.<sup>87</sup>

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85. See, e.g., *Smith v. St. Paul & Duluth R.R.*, 62 N.W. 392 (Minn. 1895). In *Smith*, a railroad engineer who admitted being drunk while operating a train won a jury verdict over his discharge. In overturning the jury's verdict, the Minnesota Supreme Court stated:

The trial judge, when denying defendant's motion for a new trial, frankly stated that he would have been better satisfied if the jury had found that the defendant had good cause for discharging the plaintiff from its service. We are not surprised at this expression of dissatisfaction, for we regard the evidence as conclusive upon this branch of the defense; and, although it is with great reluctance that we interfere with the determination of a question of fact by a jury, these are cases where justice imperatively demands that it be done. This is such a case.

*Id.* at 393. Although the appellate court reversed the verdict, the initial victory by the plaintiff illustrates the difficulties employers experienced in obtaining favorable jury verdicts.

86. The existence of juries in contract cases is something of a puzzle; we never observe, for example, private individuals contracting to settle disputes over the contract's terms by selecting randomly twelve individuals from the general population, ensuring that none of the chosen individuals has any knowledge relevant to the dispute in question, and then presenting them with a subset of the information available which is chosen not for its relevance but because it meets the criteria in an artificial set of rules (a characterization that is particularly apt when considering the nineteenth century rules of evidence.)

87. The legal standard for evaluating a challenge to the sufficiency of the evidence to support a jury verdict is generally a variation on the following: "[I]f

In employment disputes over oral contracts, where the plaintiff testifies the defendant employer offered him a job for ten years, while the defendant offers testimony that it did no such thing, it will be impossible for a court to find there was insufficient evidence, despite a deeply held belief in a particular case that the employer's evidence was superior.<sup>88</sup> The obvious reason for such rules is that giving judges too much authority to second guess the jury would destroy the jury's role as decisionmaker.

Adopting gatekeeper rules can prevent cases from reaching a jury in the first place. Gatekeeper rules create legal tests which a court must resolve before the case proceeds to a fact finding stage. Some gatekeeper rules are of general applicability, such as the modern Federal Rule 12(b)(6) and its state counterparts. Under this rule's nineteenth-century predecessors,<sup>89</sup> the trial court could dismiss a case if the plaintiff presented no claim under the appropriate law. These rules may also be of a more specific nature and apply to only particular cases.<sup>90</sup> Implementing a gatekeeper rule solves the problem of second guessing. By letting the court decide *before* the jury has a chance to consider the case, there is no need to sift through the record to discover the jury's mistake. Appellate courts can, of course, apply gatekeeper rules *ex post* to correct trial courts' failure to properly apply them in the first instance.

Third, courts lack control over their agendas. Although they can shape the issues in a case, if for no other reason than they get the last word on what

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reasonable men could differ as to the meaning of the evidence when the facts are viewed in the light most favorable to the prevailing party, the evidence is sufficient to support the verdict." *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378, 383 (6th Cir. 1983) (applying Michigan law).

88. See, e.g., *Du Pont Co. v. Waddell*, 178 F. 407 (4th Cir. 1910). In *Waddell* the employee was discharged after numerous incidents of drunkenness on the job. The court found there was a year contract, and thus there was a jury question on the issue of whether the drunkenness constituted cause by interfering with the employee's performance. The employee prevailed at trial and the Fourth Circuit upheld the verdict saying "While we are impressed by the weight of the testimony [on the issue] and the forbearance of the [employer], yet the question as to its weight, in light of the whole testimony, was for the jury originally . . ." *Id.* at 413. Similar problems arise when the question is simply which witness to believe. See *Rudlin v. Parker*, 43 S.E.2d 918 (Va. 1947), for an example of such a case.

89. "Rule 12(b)(6) is the successor of the common law demurrer and the code motion to dismiss." 5A CHARLES A. WRIGHT ET AL, *FEDERAL PRACTICE AND PROCEDURE* (1990) § 1349. See also *Id.* §1355. The modern test is often stated as, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This particular gate is obviously one which rarely closes.

90. FED. R. CIV. P. 9(b) (fraud rule) is such an example.

the issues actually are, they must face (in most instances) the facts and issues the parties bring before them. Gatekeeper rules give the courts a greater degree of control over their agendas. They create conceptual bins in which courts can dispose of cases without close factual analysis. Again, the hypothesis that such rules serve such a purpose does not explain why courts might wish to exercise that control. The little theory we have about courts suggests that more control is welcome, regardless of the underlying reasons for making use of it.<sup>91</sup>

Employment at-will is a gatekeeper rule; the alternative default rules are not. Finding that a contract exists for a term, however small, means that the case must proceed to a jury for a determination of whether the contract was breached, the amount of damages, and the content of other terms.<sup>92</sup> Labelling a contract as at-will, on the other hand, ends the analysis. The first requirement for a theory explaining employment at-will is that it take into account this institutional context. Given the rule's nature as a means of allocating power between judges and juries, one must consider differences among state judiciaries.

## 2. Inter-State Differences in Courts

There was a great deal of variety in the structure of state court systems in the mid to late nineteenth century, as there is today. Some states, for example, had intermediate courts of appeals as well as supreme courts, while others had only a supreme court to review trial court actions.<sup>93</sup> State

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91. A number of not necessarily mutually exclusive possibilities exist: judges might want to reduce their workloads so they can leave the office early; Feinmanish judges might seek to systematically exclude claims by the middle class; Jacobyish English judges might seek to protect their less fortunate middle class brethren; an ideological judge might wish to dispose of cases whose facts would hinder adoption of the correct rule; and judges up for reelection or reappointment might prefer to avoid politically sensitive issues by deflecting the case into legal rules which they have "applied" rather than "created."

92. When did the contract term begin? What were the contract's terms concerning discharge during the term? Should terms relating to discharge be implied into the contract? Was there good cause for the discharge? What were the employee's damages?

93. This brief description does not capture the full flavor of the variety of judicial structures. Beginning in 1876, Texas, for example, had two courts of last resort: the Texas Supreme Court heard civil appeals and the Texas Court of Criminal Appeals heard criminal appeals. (The state's intermediate appellate courts received criminal jurisdiction only in 1980.) From 1879 to 1891, Texas experimented with an Appeals Commission, which issued recommended opinions in cases, some of which the Supreme Court adopted. Other states had their own peculiarities.

supreme court judges received quite different compensation in nominal terms. In 1904, for example, salaries ranged from \$10,500 for the Chief Justice in New York and Pennsylvania to \$2,500 for associate justices in Nebraska and North Carolina.<sup>94</sup> Significant disparities undoubtedly remained even after considering the relative costs of living.

Another important difference was in the manner of selection. Beginning in 1832—a majority by the Civil War—many states began electing appellate judges; many also elected trial judges.<sup>95</sup> Election methods included both nonpartisan and partisan elections.<sup>96</sup> The next most popular method of selection was nomination by the governor with confirmation by the upper house of the state legislature.<sup>97</sup>

A third difference concerns the term for which judges serve. Federal judges and some state judges held office for “good behavior,” effectively for life. Many state judges, however, served only fixed terms, ranging from two (Rhode Island) to twelve years (West Virginia) during the period in question.<sup>98</sup> There is thus both a qualitative difference between states which limit judges to specific terms and those which do not and a quantitative

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94. Simon Fleischman, *The Influence of the Bar in the Selection of Judges Throughout the United States*, 39 AM. L. REV. 348, 371, 373, 375 (1905).

95. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 THE HISTORIAN 337, 337-39 (1982-83) (hereinafter Hall, *On Trial*).

96. There were many ways of electing judges, of course. State politics might be dominated by one party, making the primary the important election. Judicial elections might be held at the same time as other major statewide contests (CAL. CONST. of 1879, art. VI, § 2) or held as special elections with only judicial races. (CAL. CONST. of 1862, art. VI, § 3.) Some states used the Australian ballot, held direct party primaries, or introduced non-partisan judicial ballots. See Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 351-62 (1984) (hereinafter Hall, *Progressive Reform*). All these affected turnout and public interest in judicial races.

A third alternative, the Missouri plan, where state judges face retention elections in which they run unopposed for retention, became popular in the twentieth century. If a majority reject the judge, the governor then appoints a new judge. This is the method California uses today, for example. It does not produce automatic retention, as the experience of former California Chief Justice Rose Bird in 1986 demonstrates.

97. Again, there were several variations on this basic scheme: Rhode Island, for example, had the legislature choose judges directly. In Massachusetts the governor's judicial appointments were (and are) confirmed not by the state senate but by the Governor's Council. The members of this rather obscure body are themselves elected by district, and Massachusetts' unusual election laws allow both voting by convicted felons and their election to state office.

98. EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 127-28, 134 (1944).

difference among the states with limited judicial terms over the length of the term.<sup>99</sup>

### 3. Institutional Questions

In asking why states adopted the at-will rule, one must begin with its common law pedigree. One must consider not only why judges adopted the rule but why some judges adopted it sooner than others.<sup>100</sup> By failing to address these questions, the existing theories fall short. Even if the rule is a scheme for repressing middle class employees as Feinman argues, for example, why did it appear first in some states rather than others? The empirical analysis presented in the next section attempts to address the question of the influence of the differences in judicial selection affecting adoption. The question of why judges adopted the rule rather than legislators is not, however, amenable to empirical testing and I will return to it in Part V.

## IV. EMPIRICAL ANALYSIS

By using a hazard model one can empirically test the theories presented in Part II.<sup>101</sup> Hazard models measure the influence of various factors on the

99. Term lengths vary within states as well, with higher court judges generally holding office for longer terms than lower court judges. In Arkansas, for example, the Juries of the Supreme Court were elected to eight year terms in the nineteenth century, while the Circuit Court was elected to four to six year terms. HAYNES, *supra* note 98, at 102-03.

100. There are a number of ways in which the method of selection might influence judges in choosing the at-will rule. Elections might produce a different type of judge than appointments, presumably one more concerned with popular support. Alternatively, election of judges might be correlated with other aspects of states' political cultures in a way which would alter the probability of adoption.

Some scholars consider term limits more significant than the method of judicial selection. See generally Hall, *Progressive Reform*, *supra* note 96, at 345, and Part IV.A.4 *infra*. The presence of limited terms on judges would presumably make them more sensitive to the political figures who controlled reappointment or renomination. If employers in turn dominated those political figures, then one might associate term limits with judicial sympathy for the at-will rule.

101. Hazard models take their name from the hazard function, the definition of which is the instantaneous rate of leaving a given status per unit time period at time  $t$ . In the case of time invariant covariates, one can write this as:

$$\theta(t) = \lim_{dt \rightarrow 0} \frac{P(t \leq T < t+dt | T \geq t)}{dt}$$

time it takes for an event to occur. Thus, they are a natural technique for exploring the influence of political and economic variables on states' adoption of the at-will rule. Given the lack of a theoretical framework for modelling the behavior of individual judges, the hazard model is also attractive since it uses the state as the unit of observation. In this section I present the results of a hazard analysis of the adoption of the at-will rule during the period 1870-1908.

The specific form of the hazard model used here is the Cox proportional hazards model with time varying covariates.<sup>102</sup> The hazard rate in this model is given by

$$h(t; z) = h_0(t) \exp(\beta'z)$$

where  $t$  represents time,  $z$  represents a vector of characteristics of states at time  $t$ ,  $\beta$  represents a vector of coefficients for the characteristics, and  $h_0(t)$  is an unknown hazard function for a state with covariate vector  $z = 0$ . An important feature of the Cox model is that the baseline hazard is allowed to

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using the adoption of the at-will rule as an example, the hazard function defines the probability that a state will adopt the at will rule, conditional on the fact that it has not yet adopted the rule at time  $t$ . The presence of time varying covariates (such as the capital-labor ratio) complicates matters, but the basic intuition remains the same. For a further elaboration of hazard models in an economic context generally and models with time varying covariates in particular, see TONY LANCASTER, *THE ECONOMETRIC ANALYSIS OF TRANSITION DATA* (1990). There are aspects of the theories which, due to data and modelling limitations, cannot be included in an econometric model. We can, however, compare the theories' implications with the data which exists and draw some conclusions

102. See D. R. COX AND D. OAKES, *ANALYSIS OF SURVIVAL DATA* (1984).

vary over time, and thus no assumptions are necessary concerning the shape of the baseline hazard.<sup>103</sup>

### A. Data

This section describes the data used in the empirical analysis and explains in detail the choices made in constructing the dataset.<sup>104</sup>

#### 1. Defining the Sample

Although all fifty states and the District of Columbia have some form of the employment at-will rule today, one cannot include all of these jurisdictions in the analysis. To pick but one potential problem, one must note that not all of them were in existence in the late nineteenth century when most states were adopting the at-will rule. One of the requirements of an empirical analysis of the time to adoption is that there be a means of measuring the length of time. This requires that there be a starting point defined for each case.<sup>105</sup> For

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103. Nicholas M. Kiefer, *Econometric Duration Data and Hazard Functions*, 26 J. ECON. LIT. 646, 667-68 (1988). There are two important assumptions necessary to use this form of the model. First, the model assumes that the effects of covariates on the hazard function are constant across time. In this paper this means that the election of judges, for example, changes the probability of adoption of the rule in the same fashion in 1870 as it does in 1900 (or any other year.) Given the relatively short period defined for the analysis, assuming a constant effect of the covariates is not unreasonable. There were no major changes in the structure of the judicial system or legal thinking during this time period which might be expected to alter the impact of the covariates on adoption. There clearly was such an event in the decade prior to the period in question (the Civil War) and following the period (the *Adair* decision.) Second, the effect of the covariates on the hazard function is assumed to be log-linear. The presence of time varying covariates, as always, complicates matters here. With only time invariant covariates, a proportional hazards model assumes that  $h_i(t)/h_j(t) = k$ , where  $i$  and  $j$  represent two different states (in this paper) and  $k$  is some constant. The presence of time varying covariates makes the model not truly proportional in this sense, although the technique remains valid. See LANCASTER, *supra* note 101, at 23-32. There is no reason to think log-linearity is not a reasonable assumption and that it is not uncommon in analyses of political events (see, e.g., Gary King, et al., *A Unified Model of Cabinet Dissolution in Parliamentary Democracies*, 34 AM. J. POL. SC. 846 (1990)).

104. I believe it is particularly important in empirical analysis of the common law to keep one's hands above the table at all times because the inherent fuzziness of the law offers many opportunities to fail to capture key institutional details. See Morriss, *supra* note 8. This section thus errs on the side of over-description.

105. In studies of the duration of unemployment, for example, this is often the time at which the individual loses her job. Similarly, in a study of the duration of



obvious reasons, the definition of the time origin needs to be consistent across observations, although it need not be the same calendar date. Any arbitrary date would meet the requirement of consistency. The model requires that the duration be positive, however, and so any states which adopted the rule prior to the date chosen must be excluded. While a date prior to the adoption of the at-will rule by the earliest adopting state would minimize the number of states included, the unavailability of usable data on industrialization prior to 1870<sup>106</sup> precludes an earlier starting date.

Even where data is available, limiting the study to a relatively homogeneous time period is desirable. A second reason for choosing 1870 is the significant changes in the United States' economy and political system which occurred after the Civil War. The Civil War brought political turmoil and rapid, if uneven, industrialization.<sup>107</sup> It would be likely, therefore, that any processes governing adoption of legal rules related to either industrialization or political sentiments would also vary between pre-Civil War and post-Civil War adopters. While choosing a post-Civil War cutoff loses data on the two early adopters, it has the advantage of focusing on a group of states which adopted the rule through similar processes.<sup>108</sup>

The second important requirement for implementing a hazard model is to choose a cut-off point for the measurement of the time to adoption.<sup>109</sup> The history of the rule suggests a logical cutoff point.<sup>110</sup> In 1908, the United

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parliamentary governments, the time the government was formed serves as the origin. See King et al., *supra* note 103.

106. Simon Kuznets and Dorothy Swaine Thomas, *Introduction*, in Everett Lee et al., *Methodological Considerations and Reference Tables*, 1 KUZNETS AND THOMAS, *supra* note 55, at 5.

107. JEFFREY G. WILLIAMSON, LATE NINETEENTH CENTURY AMERICAN DEVELOPMENT 2-4 (1974) [hereinafter WILLIAMSON, LATE NINETEENTH CENTURY].

108. Another reason for choosing 1870 as a starting point is that state boundaries continued to vary substantially until 1870. After 1870, only North and South Dakota, formed out of the Dakota Territory in 1889, and Oklahoma changed boundaries significantly. Lee, *Migration Estimates*, *supra* note 81, Appendix A, at 101 (citing EDWARD M. DOUGLAS, BOUNDARIES, AREAS, GEOGRAPHIC CENTERS AND ALTITUDES OF THE UNITED STATES AND THE SEVERAL STATES, GEOLOGICAL SURVEY BULLETIN 817 (1930)). As late as the 1860-1870 decade, there were substantial boundary changes in thirteen states and territories: Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, Utah, Virginia, Washington, West Virginia, and Wyoming. *Id.*

109. It is one of the strengths of the hazard model generally that it is able to efficiently make use of censored data on entities for whom the event under study has not yet occurred by the end of the time period.

110. Another possibility would be to simply measure time until all states had adopted the rule. This is not possible for several reasons. First, several states did not

States Supreme Court "constitutionalized" the at-will rule in *Adair v. United States*.<sup>111</sup> In overturning a federal statute forbidding employers from insisting employees not belong to labor unions, the *Adair* Court held:

In the absence . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.<sup>112</sup>

Although the at-will rule itself was not an issue, the Court's reliance on the existence of at-will contracts was clearly influential in the spread of the rule.

After this decision, the pressures for adoption of the at-will rule changed significantly. Given the recognition by the Supreme Court of the rule, lawyers in states without a recognized rule would have persuasive authority for adoption.<sup>113</sup> Although state courts could have imposed weaker evidentiary

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"adopt" the rule by recognizing it in a published judicial opinion until very late. In New Mexico, for example, the first explicit recognition in a published opinion was in a federal case, *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir. 1953). Later New Mexico cases cite *Odell* as the source of the rule. See, e.g., *Bottijliso v. Hutchison Fruit Co.*, 635 P.2d 992, 994 (N.M. Ct. App. 1981). Similarly, there is simply no decision recognizing or mentioning the rule in New Hampshire until the decision sharply limiting the rule in *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974). The circumstances of those states' "recognition" of the rule suggest that lawyers saw the rule as applicable in those states well before that time despite the lack of formal recognition by the state courts. Thus a modern cutoff point will seriously overstate the time to adoption for the very late adopters and violate the model's requirement that covariates have a constant effect across time.

111. 208 U.S. 161 (1908). A second decision in 1915 used the rule in a similar fashion in overturning a state statute with the same aim. *Coppage v. Kansas*, 236 U.S. 1 (1915).

112. *Adair*, 208 U.S. at 175-76.

113. *Adair* had other effects as well. Because of the strength of the freedom of contract cases, attorneys would be unlikely to base an appeal on the ground that the at-will rule did not apply, reducing the opportunities for a court to state the rule.

The *Adair* holding also reduced the need for a state court to state the rule by creating a higher level of certainty about the rule in the absence of a definitive state court ruling. This is reflected in the manner of adoption by state courts. While some, although not all, pre-*Adair* opinions adopting the rule made it clear that the decision was settling an undecided question of state law and considered alternatives such as the English rule, almost no post-*Adair* decisions did so. Rather, post-*Adair* adoption is generally evidenced simply by a statement that the rule applies followed by a citation to a treatise or authority from another state. Compare *Patton v. Babson Statistical*

requirements for contracting out of the default at-will contract or selected a different rule, I was unable to find any post-*Adair* cases which did so. There may be something to be learned by examining the post-*Adair* timing of adoption, but that is a separate project.

For these reasons, I chose to examine empirically the adoption of the at-will rule in the period from 1870 to 1908. Thus, the two states which adopted the at-will rule through the common law prior to 1870 (Maine and Mississippi) must be excluded.<sup>114</sup> States which adopted the rule after 1908 are simply recorded as censored observations, enabling the fact that they did not adopt the rule prior to *Adair* to contribute to the estimation of the model's likelihood functions.

Some jurisdictions did not exist during the relevant time period. Thirteen current states became states after 1870.<sup>115</sup> Those which attained statehood after 1908 do not belong in the analysis. The eight which became states during the period 1870-1908 present a more difficult question as it would be desirable to include them in the analysis. Simply including the pre-statehood years in the analysis as if the state existed, however, is inappropriate. Although territorial courts existed, pre-statehood and post-statehood judiciaries, politics, and governments differed significantly.<sup>116</sup> One of the

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Org., 156 N.E. 534, 535 (Mass. 1927) (simply stating the rule as an obvious proposition in less than a sentence citing cases from Washington and North Carolina and an A.L.R. annotation), *with* *Martin v. The New York Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895) (After distinguishing an earlier case with a different rule and discussing Wood's treatise, the court noted the lack of uniformity among the lower courts, and explicitly adopted the at-will rule.).

114. One would expect the exclusion of these two states to bias the analysis in favor of the industrialization hypothesis, since neither early adopter was significantly industrialized at the time of adoption (or since) and so their exclusion should cause the model to overstate the effects of industrialization.

115. The states and years of statehood are: Alaska (1959), Arizona (1912), Colorado (1876), Hawaii (1959), Idaho (1890), Montana (1889), New Mexico (1912), North Dakota (1889), Oklahoma (1907), South Dakota (1889), Utah (1896), Washington (1889), and Wyoming (1890).

116. *See, e.g.*, CLARK C. SPENCE, TERRITORIAL POLITICS AND GOVERNMENT IN MONTANA 1864-89, at 290-311 (1975), describing Montana's struggle for statehood. A key difference was federal rather than local control of state positions, including judicial appointments. Where, as in the Dakotas and Montana, state and national politics were significantly different (Democratic vs. Republican, free silver vs. gold standard), this would naturally affect the individuals appointed. *See generally id.*, Table 2, at 234-35; GEORGE W. KINGSBURY, 1 HISTORY OF THE DAKOTA TERRITORY 175, 181, 582, 634 (1915); and 2 KINGSBURY at 1349, 1377, 1405, 1434-35.

Dakota furnishes several examples of the results of extra-territorial appointments. Kingsbury described Territorial Supreme Court Chief Justice Peter Shannon's second term in 1915 as follows:

most obvious ways in which they differed is that territorial judges were appointed by the President rather than chosen locally.<sup>117</sup> Also, the President

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[It] had not been marked by that friendliness, respect and confidence that should exist between the presiding judge and the members of the bar practicing in his court, but on the contrary, there had grown up a feeling of distrust toward the judge, and an entire and a total lack of confidence in his official integrity.

2 KINGSBURY at 1182.

A number of Dakota attorneys took the extraordinary step of campaigning against Shannon's reappointment for a third term (which the territorial governor supported) in Washington, submitting a petition charging Shannon with insulting attorneys and parties in open court, offensive partisanship in criminal cases, endeavoring by threats and other coercive means to secure endorsement of attorneys for reappointment, being publicly intoxicated (noting "the habit has grown on him"), and writing fictitious letters. 2 KINGSBURY, *supra*, at 1182-83. At least part of Shannon's problems were clearly due to his association with the unpopular Governor Nehemiah Ordway and his participation in Ordway's schemes to obtain one of Dakota's Senate seats after statehood. HERBERT S. SCHELL, DAKOTA TERRITORY DURING THE EIGHTEEN SIXTIES 100 (University of South Dakota, Governmental Research Bureau Report No. 30, 1954). Shannon was also not considered to be up to the job's intellectual demands. Kingsbury noted that he "was said to have been a justice of the peace in Maine, and not familiar with our statutes regulating intercourse with the aborigines of the Northwest." 1 KINGSBURY, *supra*, at 582.

Gilbert Moody, a leading territorial politician, complained to the federal attorney general, "You pledged us that we should have *good men* and good lawyers sent to us as judges and we get to constitute our Supreme Court an ass, a knave, and a drunkard." Letter from G. C. Moody to Attorney General Williams, March 13, 1873, quoted in Lamar, *supra* note 82, at 138. Moody himself was later appointed to the Territorial Court. *Id.* at 190-91.

Kingsbury's account of the May 1885 meeting of the Dakota Territorial Supreme Court demonstrates that national, rather than state politics, dominated the territorial judiciary: "As there were six judges and all were republicans, all felt that they were probably assembled for the last time, and that before another session their places would be filled by representatives of the democratic party, by appointment from President Cleveland." 2 KINGSBURY, *supra*, at 1434.

A 1905 survey of lawyers in the states and territories also highlights the difference in the selection of territorial judges. In response to questions about the bar's influence on judicial selection, the lawyers who responded noted, for example, that "Bar should exert an influence in the selection; but it is impossible under the territorial form of government" (Indian Territory), and "[c]orrespondents agree that [the] bar should exert an influence in the selection, but find it impossible under territorial government." (Oklahoma territory). Fleischmann, *supra* note 94, at 367, 374.

117. See generally, EARL S. POMEROY, THE TERRITORIES AND THE UNITED STATES 1861-1890, (1947). Well under half of territorial judges came from within the territories in which they served:

also frequently removed territorial judges.<sup>118</sup> These differences, and others,<sup>119</sup> make inclusion of territorial data improper.

Territory	Resident	Nonresident	Total
Arizona	4	23	27
Colorado	5	9	14
Dakota	16	19	35
Idaho	10	16	26
Montana	7	16	23
Nebraska	1	8	9
Nevada	1	4	5
New Mexico	8	32	40
Utah	8	29	37
Washington	14	14	28
Wyoming	4	16	20
TOTAL	78	186	264

See also LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 376-77 (2d ed. 1985) (Territorial judges' "worst sin, perhaps, was politics. Federal judges served for life; but the justices of territorial supreme courts were appointed to four-year terms and could be fired at any time. This thrust territorial courts into 'perhaps the wildest political scramble in American history.' The phrase is from John Guice's study of these courts in three Western states.")

The combination of lack of tenure protection, close supervision by the United States Attorney General, oversight by the federal Supreme Court, and the legal backgrounds of non-native appointees produced a strong nationalizing effect. See John D.W. Guice, *The Role of the Territorial Supreme Courts: The Historian's View*, in *THE AMERICAN TERRITORIAL SYSTEM* 107 (John Porter Bloom, ed.) (1969).

118. POMEROY, *supra* note 117, at 52.

119. Other differences included: (1) Before 1884, territorial judges often sat on appellate panels reviewing their own decisions, leading to the nickname "Supreme Court of Affirmance" for Arizona's territorial supreme court. POMEROY, *supra* note 117, at 53. (2) The power of the territorial judge made the judge a key player in territorial politics. See LAMAR, *supra* note 82, at 171 describing Granville Bennett's career from territorial judge to congressional delegate. See also *supra* note 116. Ex-Senator Alonzo J. Edgerton of Minnesota was appointed Chief Justice in Dakota in 1880, apparently with a view-to becoming a senator after statehood. LAMAR, *supra* note 82, at 198. (3) Territorial courts were poorly organized, lowering the probability a case could be heard at all. In Dakota, for example, no judges were present for the first sessions scheduled for May 1862, and only in 1865 was the entire bench present for a session. Some districts seldom had court sessions because of their remoteness. SCHELL, *supra* note 116, at 100. Territorial court decisions were poorly reported. In the Dakota Territory, for example, the territorial Supreme Court did not issue its first reported decision until six years after the Court was formed; the Court published a

The cost of exclusion is relatively low. Of the thirteen states which did not exist in 1870, only eight became states before 1908.<sup>120</sup> Of these, three adopted the at-will rule through civil codes rather than judicially, and so would be excluded regardless of the date of statehood. Thus only five<sup>121</sup> are excluded on statehood grounds and I chose to preserve consistency of the definition of time to adoption by excluding them.

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mere six decisions in its first fourteen years. William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 9, 17, 38 (1968). The court might have decided a question in an early unreported case, and when faced with the same question later, remembered its earlier decision and followed it in a reported decision. Dating the decision from the second one would thus be incorrect. These decisions were not clearly binding on post-statehood courts. See, e.g., *Clare v. Palmer*, 203 P.2d 426, 429 (Okla. 1949) and *Glatt v. Feist*, 156 N.W. 2d 819, 825 (N.D. 1968) (question is one of "first impression in this state since statehood" and discusses territorial precedent as persuasive but not binding.)

A dummy variable for territorial status would therefore be insufficient to control for the differences in how structural variables would affect the hazard rate. Pre-statehood data are also scarce. Census data for North and South Dakota, for example, were not reported separately before statehood, and census data for Oklahoma are unavailable for 1870 and 1880 as no census was taken. See Lee, *supra* note 81, at 361.

Another option would be to count the years to adoption from the date of statehood. This would have unattractive consequences for the model, however, since it would be an inconsistent definition. For example, the model would treat Colorado's adoption in 1876 as equivalent to adoption in 1870 by a state which existed in 1870. Since it is likely that 1870 and 1876 differ in ways the explanatory variables are unable to capture, the gain from adding in the new states in this fashion must be measured against the damage to the assumption that time to adoption is defined consistently across states.

A final option would be to treat the new states as left censored observations, including only the years after statehood in the model. Colorado, for example, would enter the model for one year, 1876, the year it both became a state and adopted the at-will rule. While this does not present a problem econometrically, it raises theoretical concerns about the equivalence of the new state's experience relative to that of the older states. Statehood was a momentous occasion, and the immediate post-statehood years are ones in which the judiciary, along with other institutions, behaved differently than in the established states. To take only the most obvious examples, statehood brought new judges to the bench and there was no established body of precedent to influence the states' courts in employment cases. Of course, new states' courts could look to other states' cases, but such precedents were not binding like a prior decision of its own would be. See Morriss, *supra* note 8, for additional discussion of these issues.

120. See note 115, *supra*.

121. Colorado, Idaho, Utah, Washington, and Wyoming. These five states have contributed only sixty-four state-years to the more than a thousand state-years in the estimation.

Finally, this is a model of the adoption of the common law employment at-will rule. Louisiana, as a civil law state, is obviously inappropriate for a model of common law processes.<sup>122</sup> Four other jurisdictions also adopted rules similar to the at-will rule as part of a general codification: California, Montana, North Dakota and South Dakota.<sup>123</sup> These must also be excluded. These exclusions reduce the number of jurisdictions in the model to thirty-four. The exclusions are summarized in Table IV.

**Table IV: States Excluded from the Hazard Model**

<b>Civil Code States</b>	<b>Late Statehood</b>
California	Alaska*
Louisiana	Arizona*
Montana	Colorado
North Dakota	Hawaii*
South Dakota	Idaho
	New Mexico*
<b>Early Adopters</b>	Oklahoma*
Maine	Utah
Mississippi	Washington
	Wyoming

\* Did not attain statehood during relevant period

I also use a subset of this dataset consisting of data on adoptions between 1890 and 1908. This allows use of data which is available only for that period. This subset will be referred to as the 1890 subset.

## 2. Industrialization

Testing either the Feinman or industrialization hypotheses requires data on each state's level of industrialization. While there is no direct measure of industrialization, several useful proxies exist, such as: (1) the percent of the labor force in agriculture; (2) the total capital invested in manufacturing; (3) the number of wage earners in manufacturing establishment; and (4) the aggregate capital-labor ratio. Table V shows the correlations between these measures.

122. In addition it is arguable that Louisiana recognized the at-will rule, or something very much like it, in its civil code early in the nineteenth century. See Morriss, *supra* note 8 at Chapter 2.

123. Georgia also adopted an at will provision in its civil code, but after the courts had adopted the rule. The code section lists the case as the source of the rule. See Morriss, *supra* note 8 at Chapter 2.

**Table V:** Correlations Among Measures of Industrialization

	Percent Labor Force in Agriculture	Total Capital Invested in Mfg.	Number of Wage Earners in Mfg. Establishments
Percent Labor Force in Agriculture	1.0	-0.448	-0.496
Number of Wage Earners in Mfg. Estab.	-0.496	0.939	1.0
Aggregate Capital Labor Ratio	-0.383	0.323	0.185

*a. Percent of Labor Force in Agriculture*

This proxy is a relatively clear measure of the extent to which a state's economy had shifted from an agricultural base to an industrial one. Since an agricultural economy would put greater emphasis on maintaining stability in labor relations throughout the entire growing season,<sup>124</sup> under either the Feinman or industrialization hypotheses, one should associate high values with adoption.

The great shift away from agriculture in the United States as a whole was well underway by 1870, when both the data<sup>125</sup> and the empirical analysis

124. This is the explanation offered by Blackstone for the year presumption in pre-nineteenth century England:

If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well as when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.

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125. I used Miller's calculations, which are based on census data. Ann Ratner Miller, *Labor Force Trends and Differentials*, in SIMON KUZNETS ET AL., ANALYSES OF ECONOMIC CHANGE, II KUZNETS AND THOMAS, *supra* note 55, Table A.2.4, at 82. The agricultural data were adjusted to provide for comparability. See Ann Ratner Miller and Carol P. Brainerd, *Labor Force Estimates*, in EVERETT S. LEE ET AL., METHODOLOGICAL CONSIDERATIONS AND REFERENCE TABLES, I KUZNETS AND THOMAS, *supra* note 55 at 379-90.



begin.<sup>126</sup> By then almost fifty percent of the total national workforce was engaged in nonagricultural activities, as shown by Table VI. The relative decline of agriculture was not uniform, however. More than half the workforce remained in agriculture in twenty-six of the forty-seven states for which data exist in 1870.<sup>127</sup> The pattern of change between 1870 and 1910 was one of growing dispersion. In 1870, the relative deviation of states from the U.S. average in this area was thirty-seven percent; in 1910 it was forty-eight percent.<sup>128</sup>

**Table VI: Agricultural Labor Force, United States, 1870-1920**

Year	Number of Workers (000)		Agricultural Workers as a percent of total work force	Agricultural workers relative to 1870
	Agricultural labor force	Total labor force		
1870	6,437	12,506	51.5	100
1880	8,590	17,392	49.4	133
1890	9,235	22,736	40.6	143
1900	11,288	29,703	38.8	175
1910	12,390	39,167	32.5	192
1920	10,666	41,614	25.6	166

Source: Miller, *supra* note 125, Table 2.7, at 39.

**Table VII: Number of states by percent labor force in agriculture**

% in Agriculture	Number of states in each class					
	1870	1880	1890	1900	1910	1920
80.0 - 100.0	5	4	1	1	--	--
60.0 - 79.9	14	12	10	10	6	3
40.0 - 59.9	14	14	16	14	12	12
20.0 - 39.9	7	10	14	16	18	17
0.0 - 19.9	6	6	6	6	11	15
Total	46	46	47	47	47	47

Source: Miller, *supra* note 125, at 40.

126. The 1870 census was the first for which any data is available "beyond the most rudimentary detail on the composition of the population and the distribution of economic activity, by states." Simon Kuznets and Dorothy Swaine Thomas, *Introduction*, in LEE ET AL., *supra* note 125, at 3.

127. Miller, *supra* note 125, at 39.

128. *Id.*, Table 2.10, at 46.

Table VII summarizes the number of states within broad classes of percentage of the labor force in agriculture.

The decline in the relative size of the agricultural workforce varied considerably among regions. The Northeast began with a relatively low percentage of its workforce in agriculture in 1870, while each of the Southern states had more than sixty percent. The North Central states fell in between the two extremes. The West exhibited the greatest intraregional variation, due at least in part to the large mining industries in some western states. As a result of these different starting positions, the South experienced the largest decline in agriculture's share of the labor force while the Northeast changed the least as a region.

### *b. Total Capital Invested in Manufacturing*

A second proxy for industrialization is total capital invested in manufacturing establishments.<sup>129</sup> One would expect total capital invested in manufacturing to be correlated with capitalists' political strength within states. Under the Feinman hypothesis, states with more capital should be those where the courts are most likely to adopt. Similarly, under the industrialization hypothesis, total capital serves as a measure of industrialization and high values should lead to earlier adoption.

The census definition of capital, upon which these data are based, was:

the gross assets of the establishment . . . [which] are assumed to include the real property, whether land, buildings, or machinery, the actual cash on hand, the raw materials in hand or in process, the finished goods on hand, the unpaid accounts for goods made and delivered — everything in a word in the way of an asset, which the establishment may have in its possession, irrespective of whether the same is paid for or owed for.<sup>130</sup>

As Easterlin notes, this excludes "securities and loans representing investments in other enterprises, and patents, copyrights, trademarks, and good will[.]"<sup>131</sup>

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129. Richard A. Easterlin, *Estimates of Manufacturing Activity*, in I KUZNETS AND THOMAS, *supra* note 55, Table M-9, at 697. Easterlin reports values for 1869, 1879, 1889, 1899, 1904, and 1909. *See Id.* at 638-66 for a discussion of the adjustment of census data to construct a consistent series. Intervening values were interpolated by various means, including a simple linear interpolation and cubic spline interpolation. Adjustments for the variation in a detrended Frickey index were also used. *See* EDWIN FRICKEY, *PRODUCTION IN THE UNITED STATES 1860-1914* (1947). None of these adjustments produced significantly different results. The results reported are for the simple linear interpolation.

130. Twelfth Census: 1900, VII, at c., *quoted in* Easterlin, *supra* note 129, at 675.

131. Easterlin, *supra* note 129, at 675.

In general, the figures reported appear to depend primarily on undepreciated valuations.<sup>132</sup> These data are likely to be more noisy than the other industrialization series. For example, depreciation is treated inconsistently across firms. Despite this additional noise, an analysis of the 1919 data, comparing it to an independent data set derived from the Statistics of Income, found a high degree of agreement across industries.<sup>133</sup>

*c. Wage Earners in Manufacturing Establishments*

The third proxy<sup>134</sup> measures the number of wage earners in the state's manufacturing establishments, where "wage earner" is defined by the character of the work performed.<sup>135</sup> "Wage earners" are primarily defined as those who do manual labor, including those who use machines and tools, rather than persons such as clerks, stenographers, or salespeople.<sup>136</sup> As the number of

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132. *Id.* at 676.

133. DANIEL B. CREAMER, CAPITAL AND OUTPUT TRENDS IN MANUFACTURING INDUSTRIES, Appendix B, *cited in* Easterlin, *supra* note 129, at 676 n.84.

134. Data from Easterlin, *supra* note 129, Table M-2, at 684. See note 129, *supra*, for a discussion of interpolation methods and adjustments to data to construct a consistent series.

135. Easterlin stated:

[T]he concept of wage earners embraces 'working foremen and all nonsupervisory workers (including leadmen and trainees) engaged in fabricating, handling, packing, warehousing, shipping, maintenance, repair, janitorial and watchman services, product development, auxiliary power production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations.' In addition, workers engaged in construction, distribution (e.g. drivers of delivery wagons) and other non-manufacturing activities (such as cafeterias, medical, professional, and technical activities) and carried on the payrolls of manufacturing establishments are included, to some extent.

It is clear that the character of the work done is the principal criterion for distinguishing wage earners from salaried employees, and not the unit of time which is the basis for compensation. . . .

The average number of wage earners is computed by summing twelve monthly entries, each referring to the number of full and part-time wage earners on the payroll in some specified payroll period during the month, and dividing by twelve. For months in which the plant was idle, the wage-earner entry may be zero.

Easterlin, *supra* note 129, at 659-60 (citations omitted).

136. *Id.* This is, of course, not the ideal definition for use in testing the Feinman theory, since it is not based on white collar employees but primarily on blue collar jobs. Unfortunately the more broadly defined measures of the labor force which would have included these jobs are unavailable for the years prior to 1899. The total number

wage earners in manufacturing establishments rose, one would expect the at-will rule's importance as a tool of class control to increase as well under either the Feinman or industrialization hypotheses. Feinman focused on middle class employees, but a rise in wage earners should be correlated with a rise in supervisory and other middle class workers.

Although the value of this proxy increased sharply over time—the average, for example, jumped from approximately 40,500 to 135,000 between 1869 and 1909—the relative positions of states did not change nearly so much. Only three of the ten states at the bottom of the list in number of employees<sup>137</sup> rose out of the bottom ten by 1909 and only one of the top ten among those states in 1869 fell from the top tier by 1909.

#### *d. Aggregate Capital-Labor Ratio*

I calculated the aggregate capital-labor ratio by dividing the total capital invested in manufacturing by the average number of wage earners in manufacturing establishments.<sup>138</sup> This provides an aggregate measure of the capital intensity of the workforce. This is a useful index for testing Feinman's theory since states where manufacturing employees worked with large amounts of capital should also be those where the white collar supervisors of those employees were in the strongest position to make claims against the capitalists for a share of the firms' profits. Consequently, under Feinman's theory, in those states the at-will rule should be more valuable to capitalists than in states where the aggregate capital-labor ratio was relatively low.

#### *e. Other Measures of Economic Conditions*

For the 1890 subset additional data are available which measure economic conditions.<sup>139</sup> These are: (1) percent of business failures in 1895; (2)

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of employees in manufacturing establishments is available only for the years 1899, 1904, and 1909 in our period (Table M-3) and the number of persons engaged in manufacturing establishments (Table M-4), the broadest definition, is available only for 1889, 1899, 1904, and 1909. While it would have been preferable to be able to control more precisely for the number of white collar workers, one would expect that there is a strong correlation between the number of wage earners and the other categories. Total capital and number of persons engaged have a correlation coefficient of 0.971 and total capital and number of employees have a correlation coefficient of 0.977.

137. Counting only those for which data is available for both years.

138. Thus this measure differs from the more traditional firm level capital-labor ratio.

139. The data are from: RICHARD I. HOFFERBERT, SOCIO-ECONOMIC, PUBLIC POLICY, AND POLITICAL DATA FOR THE UNITED STATES, 1890-1960 [computer file]

percent of business failures in 1900; (3) number of strikers between 1881 and 1905 as a percentage of 1890 population; (4) rail mileage per 10,000 population in 1896; and (5) rail mileage per 100 square miles in 1896. The first three provide indicators of the degree to which employers would value freedom to discharge as a means of adapting to economic conditions. The last two measure the influence of railroads, which were major employers and so presumably important beneficiaries of the at-will rule.

### 3. Demographics

I also used data on total population.<sup>140</sup> These figures are based on the various census documents covering the years 1870-1910.<sup>141</sup> Intra-census figures were interpolated. Total population provides a proxy for court caseload, since states with more people would tend to have more cases brought in court. State courts with more cases, in turn, would have more opportunities to adopt the rule.

### 4. Courts

As discussed in Part III.C.2 above, state courts varied in a number of characteristics. I control for three: selection method (ELECT), tenure (TENURE), and the existence of term limits (TLIMIT).<sup>142</sup> For selection method, I used a dummy variable equal to one if the judges of the state supreme court were popularly elected and zero otherwise.<sup>143</sup> Only three states changed their method of judicial selection during the relevant time period; only two changed prior to adopting the at-will rule. In both 1870 and 1910, the great majority of the economy, by any of the three measures described above or by simple number of states, was under an elected state judiciary, as is shown in Table VIII. TENURE is the number of years of a

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Conducted by Cornell University Center for International Studies (ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, producer and distributor, 1993).

140. LEE ET AL., *supra* note 125, Table P-4A, at 349.

141. *Id.* at 105-06.

142. All three are based on the data in HAYNES, *supra* note 98.

143. As described previously, this does not fully capture the entire range of possible judicial selection methods, but the small number of states which used other methods and the limited number of degrees of freedom available make some compression necessary.

state supreme court term.<sup>144</sup> TLIMIT is a dummy variable which is set to one if the term limit is fixed and zero otherwise.

**Table VIII: Percent of Economy Covered by Elected State Supreme Courts**

Measure	% of economy covered	
	1870	1910
Number of states	59%	69%
Total population	73%	83%
Total capital invested in manufacturing	69%	77%
Average number of wage earners engaged in manufacturing	64%	73%

Sources: Total population, total capital, and wage earner data from Tables P-4, M-2, M-9 from Kuznets and Thomas. Number of States from Table 1 above and HAYNES, *supra* note 98.

Note: Excludes areas not yet states at time of measurement from totals.

## 5. Politics

Although historians often characterize the late nineteenth century as a time of issueless politics (as a reaction to the still-fresh wounds of the Civil War),<sup>145</sup> states clearly differed in their political conditions. It is, therefore, important to control for those conditions in testing the influence of economic and legal conditions. To do so, I used data from two sources: presidential election data for elections between 1870 and 1908<sup>146</sup> and data on the partisan control of state government. Presidential elections have the virtue of being conducted at the same time in each state,<sup>147</sup> with roughly the same

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144. For judges who held office for good behavior, I set the value to twenty years. Twenty years is larger than any limited term and is a reasonable estimate of the length of time a state supreme court judge might serve if given an appointment for good behavior in light of the low incidence of removal and the pattern of appointment of judges relatively late in their careers.

145. *E.g.*, JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* 106-08 (rev. ed. 1983).

146. The presidential election years in the period were 1872, 1876, 1880, 1884, 1888, 1892, 1896, 1900, 1904, and 1908. The data were taken from INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH. CANDIDATE NAME AND CONSTITUENCY TOTALS, 1788-1988 [computer file] (4th ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, producer and distributor, 1990).

147. There is no reason to believe that presidential elections themselves would be linked to the adoption of a common law default rule. The importance of the election

candidates.<sup>148</sup> Control of state legislatures and governorships represents a source of information less tied to national political events.

Since the goal was to control for the underlying political climate rather than the results of specific elections, I used factor analysis<sup>149</sup> to reduce the

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data is that it provides a nationally comparable data source for the necessary period. The theory is that whatever underlying political conditions produced a state's pattern of voting in presidential elections also produced other effects and so might be connected to the rise of the at-will rule.

148. The variation in ballots was much greater in this period than it is in modern times. In 1872, for example, Horace Greeley was the candidate of the Liberal Republicans in many states and the candidate of the Democratic party in others; at the same time Charles O'Connor ran under the Democratic label in some states. Another common phenomenon was for individuals to appear on the ballot with multiple party identifications. Thus William Jennings Bryan, for example, was endorsed by the Democrats, the Populists, the Prohibitionists, and the National Silver Party, and the Silver Republicans. *THE ENCYCLOPEDIA OF AMERICAN HISTORY* 265 (Richard B. Morris ed., 1964).

149. Factor analysis is based on the assumption that the variation in a set of  $N$  variables is due to the variation in a set of  $K < N$  underlying unobserved factors. See HARRY H. HARMAN, *MODERN FACTOR ANALYSIS* 4 (3rd ed. 1976). For a brief, less technical explanation of factor analysis, see JAE-ON KIM AND CHARLES W. MUELLER, *INTRODUCTION TO FACTOR ANALYSIS* (1978); JAE-ON KIM AND CHARLES W. MUELLER, *FACTOR ANALYSIS: STATISTICAL METHODS AND PRACTICAL ISSUES* (1978). In this case, the assumption is that a state's voting behavior in presidential elections in the period 1872-1908 is explained by underlying political characteristics of the state, and that there are fewer such characteristics than there were candidates for president in that period.

For each election the percentage of the vote for the two major party candidates was calculated. Where candidates appeared on the ballot under more than one party label, vote totals were aggregated. Where candidates appeared on different states' ballots under different party labels, I ignored these differences. For elections beginning with 1884, I calculated the total percentage vote for minor party candidates. For third parties of sufficiently national scope and size, I calculated the percentage of the vote. Again, I ignored differences in party labels (a particular problem with Eugene Debs' candidacies). (Without these consolidations of results, it would have been impossible to conduct a cross state factor analysis due to the lack of observations for many candidates in many states.) Finally, note that the sample size for the hazard model is reduced by one state for specifications which include these variables because residents of the District of Columbia were not permitted to vote for president during this period.

An alternative method of making use of this data would have been to introduce the election data as a time-varying covariate, assigning non-election years data based on election returns in adjacent years. This method was undesirable for several reasons. Not only would it have required an arbitrary assignment of non-election year dates, but it would have ignored the potential information in previous and following elections.

presidential election data to variables representative of the political climate. This analysis produced six factors, whose values appear in Appendix C.<sup>150</sup>

Although the precise interpretation of the factor scores is less important for the model than their provision of the ability to control for political variation, the six factors have natural interpretations. Factor 1 correlates positively with Republican support, and negatively with Democrat support and one can interpret it as the degree of identification with each of the two major parties. Factor 2 correlates positively with support for Eugene Debs and some of the minor party vote shares. It serves as an index of attachment to the major parties. Positive scores indicate lower attachment. Factor 3 loads most highly on the Grant/Greeley race in 1872, and can be interpreted as an index of attitudes toward Reconstruction. A positive number indicates support for moderate positions. Factors 4 and 6 correlate with votes in races where hard/soft money was a major issue, with Factor 4 representing attitudes when the silver issue is present and Factor 6 attitudes when it is not. Positive scores indicate support for soft money. Factor 5 loads highly on populist and socialist votes. A high number suggests support for radical change.

I used data on the partisan control of state governments to construct three dummy variables<sup>151</sup> used in the analysis.<sup>152</sup> One variable indicated majority control of the upper house of the legislature by Democrats, the second indicated majority control of the lower house.<sup>153</sup> The final dummy variable indicates Democrat control of the governorship.

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For example, in the case of unusual elections, such as 1872 when the Democratic party was still suffering from the after effects of the Civil War, the model would be unable to consider the useful information of the more "normal" election of 1876.

150. Only the relative values of factor scores are meaningful.

151. In addition to the dummy variables for the control of the legislature I experimented with using the percentage of seats in each house held by Democrats and an index created by adding the percentage of Democratic members of both houses. Neither yielded results as significant as the dummy variables. See Appendix B, available from the author, for results.

152. The source of the data was: W. DEAN BURNHAM, PARTISAN DIVISION OF AMERICAN STATE GOVERNMENTS, 1834-1985 [computer file] (ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political Research, producer and distributor, 1993).

153. The Burnham data file, *id.*, includes data only for election years. For non-election years, I carried over data from preceding years. There is a potential for measurement error where deaths, resignations, or other reasons led to changes but this is small since the dummy variables would change only if such events shifted control of the entire house.



## 6. Legislative Innovation

I used data on the adoption of four statutory innovations by states.<sup>154</sup> The four are: (1) adoption of child labor legislation; (2) adoption of the state minimum wage legislation; (3) adoption of workers' compensation programs; and (4) adoption of public utility regulation. Although these are changes made by legislatures, if the same underlying legal or political culture influenced both the legislature and the courts, these "progressive" reforms would serve as measures of that culture. Because these measures all reflect events occurring at the end of the nineteenth century, they could only be used in the 1890 subset estimations.

### *B. Hazard Model Results*

I performed two sets of hazard analyses. I used the entire sample to test the industrialization and Feinman hypotheses. Using the 1890s subsample, I examined the effects of the economic downturn of the 1890s, labor unrest, and growth of the railroads. Table IX and Table X present the more important results from the entire sample.<sup>155</sup>

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154. The data are from JACK L. WALKER, *DIFFUSION OF PUBLIC POLICY AMONG THE AMERICAN STATES* [computer file] (ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, producer and distributor, 1993).

155. One should interpret coefficients as follows: A positive coefficient indicates that an increase in the variable leads to an increase in the hazard rate, and thus to earlier adoption of the rule. Conversely, a negative coefficient leads to a decrease in the hazard rate and so slows the adoption of the rule.

In addition to the results presented in this section, Appendix B, available from the author, includes additional specifications. All together there are more than sixty specifications from the main sample, plus almost as many from the 1890s subsample described below. I also tried other specifications but omitted them here. The reason for these many specifications is but my unwillingness to leave any stone unturned in my attempts to explain the startling and stubborn significance of the ELECT coefficient and the insignificance of the industrialization variables described below. It took this many specifications to convince me that these effects were real. I include them to convince skeptical readers that I truly examined all possibilities.

Table IX: Full Sample Results, Part 1

Variable	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Elect	1.137* (2.022)		1.395* (2.175)		1.182* (2.059)		0.866# (1.363)		1.419* (2.178)	
Capital-Labor Ratio		-0.014* (-2.30)		-0.016# (-1.618)		-0.009# (-1.448)		-0.013* (-1.849)		-0.015# (-1.50)
Factor 1			-0.447# (-1.351)	-0.040 (-0.099)					-0.351 (-0.827)	0.031 (0.062)
Factor 2			-0.327 (-0.992)	0.172 (0.491)					-0.309 (-0.929)	0.192 (0.526)
Factor 3			-0.859* (-2.676)	-0.849* (-2.567)					-0.812* (-2.357)	-0.810* (-2.34)
Factor 4			-0.574# (-1.544)	-0.156 (-0.494)					-0.570# (-1.522)	-0.151 (-0.47)
Factor 5			0.290# (1.388)	0.295# (1.327)					0.288# (1.376)	0.289 (1.302)
Factor 6			0.366# (1.392)	0.474* (1.768)					0.381# (1.423)	0.475* (1.750)
Worker Comp. Score							-1.340 (-0.956)	-0.747 (-0.462)		
Util. Reg. Score							0.223 (0.225)	-0.260 (-0.278)		
Min. Wage Score							0.742 (1.015)	0.731 (0.816)		
Child Labor Score							-1.469 (-0.982)	-2.035# (-1.670)		
Upper House Dem.					1.112* (2.269)	0.560 (1.070)			0.258 (0.364)	0.241 (0.336)
Log Likelihood	-60.72	-60.070	-51.783	-53.021	-57.699	-59.045	-58.164	-57.260	-51.716	-53.17
c <sup>2</sup> (d.f.)	4.53 (1)	4.67 (1)	17.45 (7)	14.56 (7)	8.75 (2)	6.06 (2)	8.21 (5)	8.13 (5)	17.70 (8)	14.67 (8)
N	34	33	33	33	33	33	33	33	33	33

# significant at 10% level

\* significant at 5% level

+ significant at 1% level

Table X: Full Sample Results, Part 2

Variable	(1)	(2)	(3)	(4)	(5)
Elect	1.271 <sup>*</sup> (2.212)	1.269 <sup>*</sup> (2.202)	1.331 <sup>*</sup> (2.070)	1.341 <sup>*</sup> (2.120)	1.306 <sup>*</sup> (2.098)
Capital-Labor Ratio	-0.013 <sup>+</sup> (-2.490)	-0.009 <sup>+</sup> (-1.657)	-0.013 <sup>+</sup> (-1.326)	-0.013 <sup>+</sup> (-1.656)	-0.014 <sup>+</sup> (-1.907)
Factor 1			0.029 (0.054)		
Factor 2			0.045 (0.113)		
Factor 3			-0.807 <sup>*</sup> (-2.122)	-0.802 <sup>*</sup> (-2.142)	-0.877 <sup>*</sup> (-2.452)
Factor 4			-0.481 (-1.313)	-0.490 <sup>*</sup> (-1.381)	-0.462 <sup>+</sup> (-1.329)
Factor 5			0.266 (1.231)	0.268 (1.278)	0.287 <sup>+</sup> (1.379)
Factor 6			0.509 <sup>*</sup> (1.770)	0.507 <sup>*</sup> (1.760)	0.474 <sup>*</sup> (1.712)
Upper House Democratic		0.579 (1.036)	0.340 (0.476)	0.321 (0.522)	
Log Likelihood	-56.625	-56.081	-50.699	-50.705	-50.842
X <sup>2</sup> (d.f.)	11.19 (2)	12.97 (3)	19.14 (9)	19.10 (7)	18.44 (6)

Two results stand out in the full sample. First, regardless of the specification, the industrialization proxies, except for the capital-labor ratio, are resolutely insignificant.<sup>156</sup> The capital-labor ratio, which hovers on the borders of significance depending on the specification, has a negative coefficient, indicating that an increased capital-labor ratio tends to slow adoption of the rule. Second, the election of judges is stubbornly significant and tends to speed the adoption of the rule.

The industrialization variables' general lack of significance, and the negative sign and small size of the only one which is relatively significant, demonstrate that the story of the adoption of the at-will rule is not the same as the story of late nineteenth-century United States industrialization. The consistent significance and relatively large size of the impact of an elective judiciary points to where to look for a replacement theory. Both broad results thus tend to confirm the claim made earlier in Part B.4 that a court centered analysis is required. Both the industrialization-*laissez faire* story and the Feinman theory imply that the level of industrialization would be significant

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156. The results for the industrialization variables other than the aggregate capital-labor ratio are presented in the tables in Appendix B, available from the author. Because these results indicated resolutely insignificant coefficients, the tables containing them added little to the discussion in the main text.

and would hasten adoption. The results in Table IX, Table X, and Appendix B (available from the author) confirm the intuition that a simple examination of the dates of adoption suggests—industrialization is simply not a significant factor in courts' adoption of the rule, even after controlling for political variation and judicial structure.

Feinman bases his theory on the need for capitalists to legally turn back the new middle class of white collar employees' claims to shares of firm profits. What implications would his theory have for the effect of the aggregate capital-labor ratio?<sup>157</sup> Where the ratio is high, manufacturing employees would be more likely to be working with large amounts of capital. The role of white collar employees such as supervisors would be more important under such circumstances, enhancing the importance of restricting their claims to firm profits. A positive coefficient (hastening adoption) would therefore be consistent with Feinman's theory and the significant, negative coefficient on the capital-labor ratio provides some evidence against Feinman's theory.

Turning to results of the judicial selection and tenure variables, the literature on judicial selection suggests that the election of judges should not be significant. A combination of low electoral turnover, poor ballot positions for judicial races, and other such factors suggests that the shortening of judicial terms was more of a constraint on judicial behavior than were elections.<sup>158</sup> Yet ELECT remains both significant and relatively stable in magnitude regardless of the presence of the generally insignificant TENURE and TLIMIT.<sup>159</sup> TENURE and TLIMIT also fail to gain either substantial significance or magnitude when they replace ELECT in a specification.

As judicial elections were instituted to bring judges 'closer' to the people,<sup>160</sup> the influence of electing judges in hastening the adoption of employment at-will appears contrary to the expectations which flow from the Feinman theory. There are two possible explanations for the positive coefficient on ELECT. First, it may be true that judges who are 'closer' to the people favored the at-will rule earlier than judges 'farther' from popular will. At the very least, this is evidence that the adoption of the at-will rule was not a significant hindrance to popular support at the polls. A stronger conclusion than that, however, seems dubious given the low key character of

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157. Part IV.A.2.b, *supra*. The capital-labor ratio used here is based on state level manufacturing capital and manufacturing employees.

158. See Hall, *Progressive Reform*, *supra* note 96, for a thorough discussion of judicial elections.

159. The results of specifications including TLIMIT and TENU appear in the tables in Appendix B, available from the author.

160. See Hall, *On Trial*, *supra* note 95, for a discussion of contemporaneous views on the effect of an elective judiciary.

late nineteenth century judicial campaigns and the likely lack of importance of the choice of a default rule for interpreting employment contracts.

The second explanation is that the election of judges is related to some underlying political characteristic of the state, which in turn also affects the speed of adoption of the at-will rule. To attempt to control for such an effect, I added the factor scores derived from the presidential election returns and variables controlling for partisan control of state government as covariates. Although some covariates succeeded in reducing the magnitude of the ELECT coefficient, none eliminated its significance or changed its sign. Whatever the interpretation of the various factors, therefore, ELECT remains significantly positive even after controlling for underlying political characteristics which expressed themselves in presidential and state elections. Thus, if ELECT is actually proxying for an underlying political factor, it is a factor which did not manifest itself in presidential voting or partisan control of states' legislative or executive branches.

Although the primary importance of the factor scores and the state political variables is that they eliminate the possibility that ELECT is proxying for some major underlying political factor, some covariates also present results of interest in themselves. A negative and significant score on Factor 3, related to support for Greeley in 1872, speeds adoption. Since the Democrats of the time (and Liberal Republicans of 1872) were the party of classical liberal ideas, one would expect such states to prefer rules which left the state out of the business of contract writing. A larger Factor 5, suggesting a higher level of support for radical<sup>161</sup> candidates tends to speed adoption. States where radical presidential candidates did relatively well might be states where industrialists saw the need for tighter control of the judiciary, and thus the result could weakly support the Feinman theory. Alternatively, one would think that states where radicals enjoyed a high level of support would be those where the industrialists would close ranks with the middle class. The capitalists should, therefore, be disinclined to wage class war against middle management through the courts at the same time they were fighting off more serious challenges from the "proletariat." The white collar swing voters would not have seen early adoption, under those circumstances, as a hostile act.<sup>162</sup>

Turning to the state political variables, the control of the upper house of the state legislature by the Democratic Party is significant in a number of

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161. Radical is used here to indicate not Radical Republicanism, but support for Populist and Socialist candidates who sought radical economic restructuring of society.

162. The results for Factors 4 and 6, which loaded heavily on support for soft money, with and without the silver issue, are more difficult to explain since they have opposite signs. These results suggest that the interpretation of the factors is incorrect, but I have been unsuccessful in constructing an alternative explanation for either the factors or the results.

specifications and has a positive coefficient, reinforcing the notion that Democratic *laissez faire* attitudes, whether reflected in legislative elections or judicial elections, led to greater support for a rule which removed the government from rewriting individual contracts.<sup>163</sup> Controlling for the national political factors and the aggregate capital-labor ratio eliminates the significance of this variable, however.

Finally, including the factor scores for legislative innovations as proxies for political attitudes was unsuccessful. Although the factor scores as a group had the largest effect of any of the control variables on the significance and magnitude of ELECT, the factors themselves were insignificant.

The pattern of adoption also suggests that there may be a difference between pre-1890 and post-1890 adopters, since it was during the 1890s that the rule expanded to cover most of the United States' economy. To test whether the post-1890 adopters behaved consistently with the Feinman or industrialization hypotheses, I used the 1890 subsample and the additional data available for it.

A frequent explanation offered for the doctrine is that it freed capitalists from long term commitments to middle class workers during economic downturns. The business failure rates for 1895 and 1900 allow at least a partial test of this hypothesis, although the limited data is short of ideal. Table XI shows initial results for the failure rate for 1895 combined with ELECT and the aggregate capital-labor ratio, suggesting the failure rate has potential explanatory power.<sup>164</sup>

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163. The other state political variables were less successful when used in the analysis. Democratic control of the lower house, percent Democratic control of either house, the index constructed by adding the percent control in each house, and Democratic control of the governor's mansion all proved insignificant in most specifications. See results in Appendix B, available from the author.

164. The failure rate for 1900, results for which appear in Appendix B, available from the author, was not significant.

**Table XI: 1890s Subsample Results, Part 1**

Variable	(1)	(2)	(3)	(4)
Fail95	0.902* (2.130)	0.919* (2.307)	0.698# (1.550)	0.691# (1.581)
Elect		1.275# (1.623)		1.256# (1.597)
Capital-Labor Ratio			-0.007 (-1.259)	-0.007 (-1.219)
Log Likelihood	-39.630	-37.976	-38.696	-37.105
X <sup>2</sup> (d.f.)	1.24 (1)	5.65 (2)	2.93 (2)	7.11 (3)

N = 27

# significant at 10% level

\* significant at 5% level

**Table XII: 1890s Subsample Results, Part 2**

Variable	(1)	(2)	(3)	(4)
RR/Pop96	-0.170 (-1.077)	-0.040* (-1.726)	-0.013 (-0.812)	-0.030# (-1.471)
Elect		1.889* (2.218)		1.750* (2.093)
Capital-Labor Ratio			-0.012# (-1.568)	-0.010# (-1.422)
Log Likelihood	-40.833	-37.744	-39.433	-36.675
X <sup>2</sup> (d.f.)	1.24 (1)	5.65 (2)	2.93 (2)	7.11 (3)

N = 27

# significant at 10% level

\* significant at 5% level

Table XIII: 1890s Subsample Results, Part 3

Variable	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
RR/ Pop96	-0.020 (-1.209)	-0.057 <sup>+</sup> (-2.550)	-0.054 <sup>+</sup> (-2.508)	-0.060 <sup>*</sup> (-1.860)	-0.084 <sup>*</sup> (-2.289)	-0.063 <sup>*</sup> (-1.924)	-0.076 <sup>*</sup> (-2.055)	-0.065 <sup>*</sup> (-1.918)	-0.074 <sup>*</sup> (-2.09)	-0.090 <sup>*</sup> (-2.224)
Fail95	0.881 <sup>*</sup> (1.814)	1.553 <sup>+</sup> (2.891)	1.499 <sup>+</sup> (2.666)	0.706 (0.972)	1.234 (1.306)	0.995 (1.190)	1.478 <sup>#</sup> (1.490)	0.497 (0.570)	0.762 (0.761)	1.386 (1.229)
Elect		2.731 <sup>+</sup> (2.841)	2.575 <sup>+</sup> (2.701)			1.821 <sup>*</sup> (1.780)	1.309 (1.174)		2.463 <sup>*</sup> (2.039)	1.940 <sup>#</sup> (1.430)
Capital- Labor Ratio	-0.009 (-1.253)		-0.006 (-0.981)		-0.031 <sup>*</sup> (-1.994)		-0.024 <sup>#</sup> (-1.527)			-0.027 <sup>#</sup> (-1.638)
Factor 1				-0.692 <sup>*</sup> (-1.746)	0.014 (0.022)	-0.359 (-0.796)	0.180 (0.267)	-0.862 <sup>#</sup> (-1.385)	-0.409 (-0.60)	0.158 (0.177)
Factor 2				1.564 <sup>#</sup> (1.652)	2.964 <sup>*</sup> (2.402)	1.395 <sup>#</sup> (1.421)	2.445 <sup>*</sup> (1.934)	1.672 <sup>#</sup> (1.688)	1.487 <sup>#</sup> (1.372)	2.771 <sup>*</sup> (1.938)
Factor 3			-0.955 <sup>*</sup> (-2.397)	-0.921 <sup>*</sup> (-1.888)	-0.708 <sup>*</sup> (-1.793)	-0.705 <sup>#</sup> (-1.439)	-0.901 <sup>*</sup> (-1.771)	-0.522 (-1.057)	-0.442 (-0.74)	
Factor 4				0.019 (0.038)	0.344 (0.565)	-0.182 (-0.367)	0.285 (0.512)	-0.083 (-0.155)	-0.391 (-0.67)	0.196 (0.318)
Factor 5				0.440 (1.091)	0.200 (0.404)	0.195 (0.430)	-0.006 (-0.011)	0.648 <sup>#</sup> (1.343)	0.446 (0.859)	0.182 (0.316)
Factor 6				0.216 (0.564)	0.302 (0.735)	0.053 (0.128)	0.199 (0.481)	0.137 (0.328)	-0.076 (-0.16)	0.060 (0.128)
Dem. Gov.								-0.683 (-0.645)	-1.110 (-0.97)	-1.016 (-0.940)
Upper House Dem.								1.710 (1.134)	2.673 <sup>#</sup> (1.653)	2.892 <sup>#</sup> (1.753)
Lower House Dem.								-1.432 (-1.230)	-1.871 <sup>#</sup> (-1.53)	-2.226 <sup>#</sup> (-1.713)
Log Likeli- hood	-37.806	-33.607	-33.079	-32.980	-30.361	-31.200	-29.633	-31.766	-29.160	-27.262
c <sup>2</sup> (d.f.)	6.14 (3)	9.76 (3)	10.66 (4)	16.55 (8)	18.87 (9)	20.83 (9)	22.71 (10)	20.20 (11)	25.35 (12)	26.42 (13)

N = 27

# significant at 10% level

\* significant at 5% level

+ significant at 1% level



The 1890s subsample also allows use of measures of strike activity<sup>165</sup> and of the presence of railroads in a state. Table XII presents initial results for the number of miles of railroad per 10,000 population, again suggesting some explanatory power. (The strike activity and railroad miles per square mile measures were insignificant.<sup>166</sup>) Table XIII adds the political variables to the RR/Pop96 and Fail95 variables. The results for the variables used in the 1890s subsample are similar to those found in the full sample. The results for the two new variables suggest that an increase in business failures hastened adoption of the rule, while increased railroad presence slightly slowed adoption.

There are two possible explanations for the positive coefficient on Fail95. First, an increase in business failures would suggest, of course, an increase in the number of cases brought. The increase would come both from the larger number of persons who had lost jobs becoming potential plaintiffs and the reduced opportunities available in an economic downturn, making litigation more attractive. Second, the courts themselves might become more likely to adopt the rule as they bent to serve their capitalist masters, as in the Feinman theory. The empirical analysis is, unfortunately, incapable of directly differentiating between the two theories. The persistent insignificance of the industrialization variables, the low values of the aggregate capital-labor ratio, and the insignificance of the Fail00 and Strikes variables suggest, however, that the first explanation is more plausible.

The negative coefficient on RR/Pop 96 shows that an increase in railroad presence slows adoption slightly. This result is probably due more to the overlap between high values and populist sentiment than to the reflection of the railroads' interests in the decisions of their minions on the judiciary. This is reinforced by the failure of legislatures closely linked to rail interests to adopt strong versions of the rule when enacting civil codes.<sup>167</sup> That the presence of such significant political players did not have a large impact on adoption is some evidence against the Feinman capitalist tool argument.

One is left with the puzzle of explaining the persistent significance of ELECT. The possible explanations depend in large part on how one views judicial elections. The traditional view of the reform of judicial selection was that it was prompted by "the broadened base of popular political power associated with the Jacksonian Democratic party[.]"<sup>168</sup> Kermit Hall, the preeminent scholar in this area, summarizes a different version of the rise of

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165. Measured as strikers between 1881 and 1905 as a percentage of 1890 population.

166. Results for these variables are in Appendix B, available from the author.

167. See Morriss, *supra* note 8, Chapter 2.

168. Hall, *Progressive Reform*, *supra* note 96, at 347 (footnotes omitted).

an elected state judiciary based on extensive analysis of state appellate judges' careers, as follows:

The rise of popular, partisan election of appellate judges is best understood as an essentially thoughtful response by constitutionally moderate lawyers and judges in the Whig, Democratic, and Republican parties. They wanted the appellate judiciary to command more, rather than less, power and prestige. Far from being hostile to judicial power, they intended to enhance it. Lawyers and judges—not wild-eyed agrarian and urban radicals—controlled the all-important committees on the judiciary in the state constitutional conventions that adopted popular election.<sup>169</sup>

The identification of an elected judiciary with “constitutionally moderate” lawyers is not enough to rescue the Feinman theory. First, the rise of an elected judiciary took place in all but two of the states at the time of adoption well before the rise of employment at-will. The rise of the elected judiciary also occurred well before extensive industrialization. Thus even if the rise was a political response of the propertied elites at the time, those elites were not capitalists, and indeed would be hardly likely to have similar class interests with the upstart industrialists.

Second, by the last part of the century, elite bar opinion had turned against popular election of the judiciary.<sup>170</sup> If the bar elites were correct that elected judges were “second or third-class lawyers,” such judges were undoubtedly more inclined toward a simple, clear rule like employment at-will than their “first class” brethren in other states. The “first class lawyer” would not only be more capable of a more refined approach, he would also be more likely to view such an approach as the hallmark of good judging.

By the 1890s bar leaders favored a return to appointment. If one assumes a relatively crude instrumentalist view of control of the bar and the judiciary by moneyed interests, as Feinman does, it appears that elected state judges apparently no longer served their masters well enough. Finding that the election of judges hastens adoption even in the 1890s subset is exactly the

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169. *Id.* at 347-48 (footnotes omitted).

170. *See id.* at 349-50. For example, Simon Fleischman, in 1905, summed up the elite opinion of an elected judiciary as follows:

It appears that communities, in the ratio in which they are new and undeveloped, are still suspicious and jealous of the bar and its influence, and they have anomalously concluded that their interests are safer with a court presided over by a second or third-class lawyer than by a first class lawyer; and in a country where the people are the rulers, as in the United States, they have quite frequently succeeded in carrying out this idea.

Fleischmann, *supra* note 94, at 348.

opposite of what we should find if elected judges had abandoned their capitalist masters for the middle class voters.

Even without Feinman's instrumentalist view, however, there is no reason to think that elected judges would have been significantly *more* predisposed to protect capitalists' interests than gubernatorially appointed judges. The fact that involuntary turnover among elected judges was remarkably low reinforces this conclusion.<sup>171</sup> Actual turnover is not the whole story. Elected judges, like other elected political figures, anticipate voter attitudes toward their decisions and may alter their behavior because they know the electorate is watching them. The significant positive effect of ELECT therefore suggests that, at a minimum, the judges who chose the at-will rule were not concerned with voter anger over their choice.

It is doubtful that capitalists could directly buy elections with greater ease than they purchased appointments. It is doubtful, therefore, that voters, who included far more of the middle class population presumed by the critical literature to have suffered under the rule than capitalists, found adoption a sufficient reason to turn a judge out of office.<sup>172</sup>

A third view of the rise of an elected policy has been recently advanced by Caleb Nelson.<sup>173</sup> Nelson agrees with Hall that the elected judiciary was intended to strengthen the judiciary against the legislature. He argues that it was part of a pattern of reform intended to "rein in the power of all officials

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171. Hall, *Progressive Reform*, *supra* note 96, at 362-65 (finding that only 24.3% of the two hundred terminations of terms in California, Ohio, Tennessee and Texas between 1850 and 1920 were due to general election loss, primary loss, or removal; that only 7.5% of the terminations were due to removal; and that all removals occurred during the Civil War and Reconstruction).

172. Voters paid attention, however, to judicial decisions and in some instances a decision perceived to be against the interests of working people could result in defeat at the polls. Hall describes the defeat of Republican William Van Fleet for reelection to the California Supreme Court in 1898, due in part to his authorship of an opinion which held that \$6,000 in damages was excessive for negligently killing a four and a half year old child. The Democratic papers told voters "Van Fleet is the judge who rendered the Loren Fox decision, declaring that the life of a poor man's child is not nearly as valuable as that of a rich man's darling." *Id.* at 363-64.

Thus if a group of voters saw the at will rule as against their interests, attention to the actions of the judiciary by the voters themselves was not necessary. As the Van Fleet case demonstrates, all that was needed was for partisans of the opposition candidate to scrutinize the incumbent judge's decisions and publicize those which one could interpret as contrary to a group of voters' interests.

173. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL. HIST. 190 (1993).

to act independently of the people."<sup>174</sup> Electing judges was part of that reform

not so much to permit the people to choose honest judges, as to keep judges honest once they reached the bench. Elections mattered most not because of whom the voters chose . . . but because of the influences that the elections themselves created.<sup>175</sup>

Although Nelson's argument offers an appealing linkage between proponents of limited government and elected judges, it is insufficient to solve the puzzle here. First, Hall's research has shown that elections acted as an extraordinarily loose constraint on judicial behavior and that the makeup of the judiciary was significantly different under either system.<sup>176</sup> Second, given the presence of the extensive setup of political variables and their minimal effect on the ELECT coefficient, this greatly reduces the likelihood that this is simply a reflection of political forces.

It is possible to view these empirical results in a number of ways. My preference is to place a relatively weak interpretation on them, refrain from relying heavily on discussions of the details of the coefficients, and draw two main conclusions. First, the intuition contained in state adoption dates given at the start of this paper, that industrialization is not an adequate explanation for the adoption of the rule, holds up remarkably well even after controlling for everything from politics to judicial selection. Second, an elected judiciary was more likely than an unelected one, all else being equal, to adopt the rule early. Those two results establish that we need a better theory than either the Feinman or the industrialization hypotheses; we need a theory which relies on the courts as institutions. They also tell us that employment at-will was not a doctrine whose adoption was viewed as a significant threat by elected judges. The next section expands on those conclusions with more qualitative data.

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174. *Id.* at 224.

175. *Id.*

176. See Hall, *Progressive Reform*, *supra* note 96.

## V. A QUALITATIVE ANALYSIS OF THE INFLUENCE OF ECONOMIC AND LEGAL CONDITIONS<sup>177</sup>

Data from the nineteenth century, and often the twentieth, are not all one would want. The data's weaknesses preclude any number of desirable extensions of the formal analysis. In some of these areas less formal data analysis can add to the formal results. First, one can examine what is known about the United States economy between the Civil War and 1908 to determine if the economic changes in that time support one of the theories about the adoption of employment at-will. Second, one can compare British, European, and United States employment law of the period in more detail. The comparison of these rules governing indefinite employment contracts has generated a great deal of handwringing among critics of the at-will rule; a more detailed examination can disclose whether the furor is justified.

As shown by Table III, employment at-will spread gradually through the United States during the late 1880s and achieved majority coverage in economic terms only in the 1890s. By the end of that decade, the rule covered more than three-quarters of the U.S. economy, although a large number of jurisdictions had not yet adopted it. Comparing the pre-1890 and the post-1890 economies can shed some light on the competing theories.

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<sup>177</sup>. Historians have rewritten the economic history of the United States after the Civil War a number of times. This section draws largely on the empirical work of Jeffrey G. Williamson and Peter H. Lindert set out in WILLIAMSON, *LATE NINETEENTH CENTURY*, *supra* note 107, and JEFFREY G. WILLIAMSON AND PETER H. LINDERT, *AMERICAN INEQUALITY* (1980). The choice of these sources is based on two considerations: (1) they synthesize and evaluate in an empirically rigorous fashion a broad range of economic data on the period in question and (2) they provide the only systematic attempt of which I am aware to place that data in a general equilibrium context, thus determining the implications of changes across sectors of the economy.

Figure 6: Economic Variables, 1870-1910

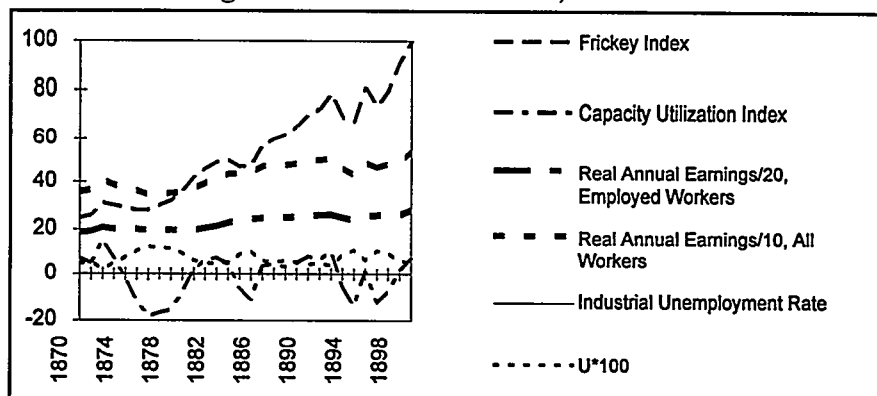


Figure 6 shows the trend of five important economic variables from 1870 to 1910. Three of these are measures of industrial production: (i) the Frickey index; (ii) a capacity utilization index; and (iii) industrial unemployment. The remaining two are measures of the real earnings of industrial workers, both (iv) unadjusted and (v) adjusted for the effects of unemployment.<sup>178</sup> As is immediately obvious from Figure 6, the 1870s were a difficult time for the U.S. economy. Unemployment soared in the mid-decade, industrial capacity utilization plunged, and real earnings sank. After recovery in the 1880s, the depression of 1893-1897 once again brought high unemployment and a fall in real wages.

Table XIV: Skilled Wage Premiums

Period	Rate of Change in the Wage Premium for Skilled Labor (percent per annum)
1840-1860	1.48%
1860-1880	0.47%
1879-1899	0.59%
1899-1909	1.06%
1909-1929	-0.09%
1929-1948	-1.99%

Source: Williamson and Lindert, *AMERICAN INEQUALITY*, Table 9.1, at 206.

178. (ii), (iv), and (v) are taken from WILLIAMSON, *LATE NINETEENTH CENTURY*, *supra* note 107, Table C.5; (i) is from EDWIN FRICKEY, *PRODUCTION IN THE UNITED STATES 1860-1914* Table 6, at 54 (1947); and (iii) is from STANLEY LEBERGOTT, *MANPOWER IN ECONOMIC GROWTH* Table A-17, at 524 (1964).

Yet the boom and bust cycle does not tell the whole story. The entire period 1870-1896 was a time of significant growth retardation, both in per capita and per worker terms. At the same time that growth was slowing, real and nominal interest rates were falling. Despite both these trends, there was an increase in real industrial wages between 1869/1878 and 1899/1908, leading to an increase in the share of wages in national income.<sup>179</sup>

Not only were real wages in general rising, but the wage premium for skilled labor rose during this period. Table XIV gives the rate of change of the wage premium for skilled labor. It increased significantly in each period after 1860 until 1909, with the sharpest rise coming after the employment at-will rule achieved majority coverage in economic terms.

Two other features of this time complete the picture. First, the post-Civil War era was, in general, a time of high tariffs. The switch to a protectionist regime had several consequences for the economy: the relative price of exportable primary products fell, the rise in the price of capital goods relative to primary goods inhibited farm mechanization, and the fall in the price of capital goods relative to consumer goods led to a rise in capital formation and increased yields to equity capital. Second, the structure of capital investment changed dramatically. Not only was there a shift into railroad investment, leading to reduced transportation costs, but there was a shift in economic activity to the West. Because most savings still originated in the East, this shift caused disequilibrium in financial markets. At the same time regional interest rate differentials declined, suggesting an increasingly integrated market. Combined with rising immigration in the 1870s, the investment shift led to explosive growth in Western cities.<sup>180</sup>

How can one use this information to examine the various theories about the rise of employment at-will? One way is to compare the depression of the mid-1870s and the mid-1890s. Feinman argues that at-will contracts enabled employers to react to economic downturns by laying off workers. Even using my earlier dating of the rule, it covered relatively little of the economy during the depression of the 1870s. Only Louisiana, Maine, Mississippi, Wisconsin, California, Illinois, Colorado, and the Dakota Territory had adopted the rule by then, and of those, three had adopted it through civil codes whose adoption was independent of macro-economic events.<sup>181</sup> The rule covered only twelve to seventeen percent of the 1880 economy (or two to five percent of the 1870 economy).<sup>182</sup>

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179. WILLIAMSON, LATE NINETEENTH CENTURY, *supra* note 107, at 98-99.

180. See *id.* for an in-depth discussion of these events.

181. See Morriss, *supra* note 8, Chapter 2.

182. These figures exclude the Dakota Territory, whose economic importance in this regard was minimal at the time.

If Feinman's attribution of the rule to Wood was correct, none of the economy was covered until sometime after recovery had begun. In either case, the rule's impact during the depression of the 1870s was minor. The depression of the 1870s also did not spark a major shift to the rule—during the 1880s only Georgia, Maryland, Tennessee and Texas adopted the rule.<sup>183</sup>

As shown in Table XIII, above, there was also a rise in real wages during the period 1880-1910 and real interest rates fell until 1896. Combined with productivity growth retardation, this meant wages' share of national income rose at the same time the at-will rule spread. Of course this does not mean that managers' and other middle class professionals' share of national income rose, but as Table XIV shows, the skilled wage premium continued to rise. It is difficult to reconcile the rise in real wages and the rise in the skilled wage premium with capitalists' concern with the establishment of a default rule for controlling a potential threat from a numerically small class. Surely a capitalist class with sufficient control of the judiciary to influence the choice of default rules would have also availed itself of that control to prevent real wage growth. The broad sketch of the economy in the 1870-1900 period also casts doubt upon the *laissez-faire* hypothesis. *Laissez-faire* thinking predates the 1890s, and the rule's slow progress up to that time itself suggests the linkage may not be that strong.<sup>184</sup>

As noted earlier, the combination of the effects of high tariffs and fall in transportation costs caused by the expansion of the railroads led to a boom in the West. The West's share of population rose steadily at the expense of both the East and the South, as shown in Table XV. Not only was much of this capital Eastern capital, but a significant portion of the United States' manufacturing remained in the East, whether measured by total capital or number of manufacturers. The western growth and the development of a national, more integrated market meant firms had greater need for employees in widespread locations. The railroads in particular required employees in multiple locations, and there was a general need for an expansion of sales staff in the new western markets. The expansion of the geographic scope of

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183. Tennessee, as discussed in note 11 *supra*, adopted the rule in a non-employment case, weakening any claim that the state adopted it to further employer rights. Georgia also adopted a particularly weak form of the rule. See Morriss, *supra* note 8, Chapter 2.

184. Both the *laissez-faire* hypothesis and Feinman's theory suggest that the spread of employment at-will should be related to industrialization. As shown above, there is no evidence that the spread followed industrialization. It might be that the rule was a precondition for industrialization. One could test this by modelling state growth to determine the influence of changes in the legal environment. This is a subject deserving future research, not just with respect to employment at-will, but for the wide range of legal changes in tort and employment law as well.



the firm meant there were more serious principal-agent problems than had been present in the more geographically limited economy of the pre-Civil War era.

**Table XV: Regional Population Percentages**

	1870	1880	1890	1900	1910
% West	31%	35%	38%	39%	41%
% East	33%	30%	28%	28%	29%
% South	36%	35%	34%	32%	31%

Source: HOPE T. ELDRIDGE AND DOROTHY SWINE THOMAS, *DEMOGRAPHICS ANALYSES AND INTERRELATIONS*, Vol. 3 of Lee et. al., *supra* note 125, at 10.

At the same time, the fall in the relative price of capital goods implies that the capital-labor ratio rose.<sup>185</sup> As the amount of capital per worker grew, so too did the consequences of a worker's mistake, and the amount of capital at risk for the owner. Again, the employer's ability to set the standard for discharge became more valuable. With respect to the typical white collar plaintiff, the employer's concern for the employee's skill increased as the employee's responsibilities and the size of the employer's investment at risk both grew.<sup>186</sup>

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185. WILLIAMSON, *LATE NINETEENTH CENTURY*, *supra* note 107, at 54-55.

186. The problem of increased principle-agent problems as the geographic scope of business expanded is evident in the following typical cases involving salesmen. While not the result of a scientific sampling of cases, these cases' facts are typical of many of the cases involving disputes between geographically separate employers and employees. *Wiley v. California Hosiery Co.*, 32 P. 522 (Cal. 1894) (a traveling salesman and his employer disagreed about the salesman's pricing below list); *Gould v. Magnolia Metal Co.*, 108 Ill. App. 203 (1903) *aff'd* 69 N.E. 896 (Ill. App. Ct. 1904) (the employer and the employee had agreed that the employee would no longer associate with a woman who had brought "discredit" to the employer in Pittsburg, the employee later took up with this woman in his new posting in Boston); *Railey v. Lanahan*, 34 La. Ann. 426, 428 (La. 1882) (in his correspondence with his employer, the employee "was offensive, abusive and insulting, and insubordinate to an extent incompatible with the successful discharge of the duties which he had contracted to perform, and thereby he ceased to be useful in his employment, destroyed those relations of confidence and respect, which are essential in the relations between principal and agent or employee, and by continued indulgence, and persistence in abusive and disrespectful language, afforded sufficient cause for the annulment by the defendants of the engagements into which they had entered with plaintiff."); *McCain v. Desnoyers*, 64 Mo. App. 66 (Mo. Ct. App. 1895) (employee discharged when his representation that he had contacts in Texas, turned out to be false and because of his refusal to comply with instruction to write his employer daily); *Ball v. Livonia Salt & Mining Co.*, 28 N.Y.S. 537 (N.Y. App. Div. 1894) (salesman discharged for refusing

Finally, the experience of blue collar workers is also relevant. Turnover among them was extraordinarily high in many industries.<sup>187</sup> Although

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to follow route list despite instructions to do so and other reasons); *Johnson v. E. Van Winkle Gin & Machine Works*, 41 S.E. 882 (N.C. 1902) (traveling salesman discharged for failure to follow instructions on reporting expenses and his whereabouts to employer). In a similar vein, consider *Moynahan v. Interstate Mining, Milling & Development Co.*, 72 P. 81 (Wash. 1903) (mine manager fired because he brought "wanton" women onto company property).

187. See DANIEL NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES 1880-1920* (1975). Turnover was extraordinarily high. For example, the New Hampshire textile manufacturer, the Amoskeag Company reported that in 1912 it hired 20,000 workers to maintain a labor force of 16,000. *Id.* (citing "Happenings" 1912, Amoskeag Papers (Baker Library, Harvard Business School, Cambridge, Mass.), VH-S). Similarly, in December 1916, 48% of Ford factory employees quit or were fired. *Id.* (citing ALLAN NEVINS, 1 *FORD: THE TIMES, THE MAN, THE COMPANY* 537 (1954)). Finally, ninety-one southern textile mills hired 57,000 new employees in 1907 but never had more than 30,000 on their payrolls at once. *Id.* (citing REPORT ON THE CONDITION OF WOMAN AND CHILD WAGE EARNERS IN THE UNITED STATES, *S. Doc. No. 645*, 61st Cong., 2d Sess. 23 (1912)).

See also DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920* at 162-64 (1978) (citations omitted):

According to data gathered for the years from 1905 to 1917, the majority of industrial workers changed jobs at least every three years. But mobility was not evenly spread throughout the workforce. In normal times, one in three factory workers moved considerably faster than the norm, staying at his job less than a year and of ten only days or weeks. At the Armour meat-packing plant in Chicago, for example, the average daily payroll numbered about eight thousand during 1914. But to keep that many employees, the company hired eight thousand workers during the course of the year, filling and refilling the places of transients. Larger surveys of textile mills, automobile plants, steel mills, clothing shops, and machine works showed turnover rates at least as high as the 100 percent reported at Armour. In the woolen industry between 1907 and 1910, turnover varied between 113 and 163 percent, and at casually managed plants or regions troubled by labor shortages it ran still higher. It reached 232 percent among New York City cloak, suit, and skirt shops in 1912-13, 252 percent in a sample of Detroit factories in 1916, and the bewildering rate of 370 percent at Ford in 1913. The most extensive survey, undertaken by the United States Bureau of Labor Statistics and using data from 1913-14, found a 'normal' turnover rate in the factories of 115 percent, and, given the depressed economic conditions in those years, that figure, if it erred at all, underestimated the normal amount of job changing.

Before the turn of the century, moreover, it is likely that the pattern was much the same. One-quarter of the mill girls employed at Lowell in

similar turnover rates would not necessarily apply to white collar workers, it does suggest that the experience of at-will employment was neither foreign to the U.S. economy generally or unknown to firms looking for a way to guard against employee opportunism among scattered employees.

Although I have been unable to locate data which would verify this hypothesis, the assumptions required<sup>188</sup> are weak ones. This explains the rise of at-will contracts, but not the rise of the at-will rule. To do that, one must determine how the rise of the at-will contract influenced the courts.

The vast majority of employment cases which went to trial had a jury.<sup>189</sup> To begin with the obvious, at the trial level the jury decided the facts, although the trial court judge played a role through ruling on motions, conducting the trial, and instructing the jury. At the appellate level, other judges reviewed the record and trial court decisions. Although I do not know how many were appealed, it is clear that a substantial number, if not percentage, of employee trial court victories were appealed and a substantial number of those included claims that the evidence was insufficient to support the verdict and/or that the trial court had erroneously instructed the jury. One of the fundamental problems for the courts in evaluating these claims was the difficulty of setting a standard by which they could measure the employee's conduct. As a result, the appellate courts which developed the

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the mid-1840s, for example, had been at their jobs a year or less. At the Lyman Mills in Holyoke, Massachusetts, in 1860, where the labor force was composed largely of immigrant Scotch rather than Yankee women, more than half the workforce was made up of such short-term workers. Even at the model Pullman plant in 1894, a fifth of the men employed had less than a year's tenure.

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Nonetheless a good deal of the turnover was clearly voluntary. The best students of the early twentieth-century workforce were convinced that quitting workers made up well over half and perhaps as many as three-quarters of all those who left their jobs. Fluctuations in the turnover rate bear out their emphasis on the high proportion of voluntary transients. Turnover was far higher in years when jobs were plentiful than in depression years, when all who had jobs worked hard and anxiously to keep them; and throughout the course of the year, turnover rose in the spring and fell in the winter in a cycle that apparently had more to do with the wanderlust Terence Powderly had noted long before among railway machinists than with industrial conditions.

188. These assumptions are that the expanded national market, rising capital-labor ratios, and other economic changes had these types of effects.

189. The facts concerning nineteenth century employment cases asserted in this section are based on my review of thousands of opinions from the period. The process of categorizing that review into concrete tables is an enormous project which is only partially complete. A future paper will include those tables.

at-will rule realized that the ability of the courts to evaluate the termination decision was weak. The at-will rule offered a partial solution by shifting cases involving indefinite contracts out of the courts.

This explanation has the additional virtue of fitting the pattern of adoption. The early adopters were Western and Southern states, not the Eastern industrial powerhouses. They also tended to be states with small bars,<sup>190</sup> large distances across which firms had to operate, juries influenced by Populist and Granger rhetoric against large employers, and courts less accustomed to dealing with employment disputes. A gatekeeper rule which shifted these cases out of the jury's reach would have been particularly welcome in such states.

A final piece of evidence against the Feinman theory can be derived by comparing the pattern of adoption of the at-will rule to that of the adoption of other common law doctrines. Although an independent investigation into the causes and timing of other doctrines is beyond the scope of this paper, I can test whether the rule was related to adoption of some other common law rules. Using tort law datings developed by Professors Bradley Canon and Lawrence Baum,<sup>191</sup> I plotted the dates of adoption for four contemporaneous tort common law innovations<sup>192</sup> against the date of adoption for the at-will

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190. For bar size information for 1905, see Fleischman, *supra* note 94, Appendix, summarizing a survey of state bar leaders.

191. Bradley C. Canon and Laurence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 79 AM. POL. SCI. REV. 975 (1981). Professors Canon and Baum graciously provided me with their original data for use here.

192. The four are: (1) negligence per se; (2) attractive nuisance; (3) single indivisible injury; and (4) abrogation of the impact doctrine. Brief explanations of each follow.

Canon and Baum used the dates of adoption of twenty-three common law tort changes during the period 1876 to 1975 to generate factor scores. I selected four from these based on their possession of sufficient adoption dates during the period 1870-1908 to make the comparison possible. Most of the changes dated by Canon and Baum were adoptions well after the period of interest.

Negligence per se: An unexcused violation of a statute or ordinance constitutes negligence under certain circumstances. The effect is to increase the ease with which a plaintiff may prove negligence. W. PAGE KEETON, ET AL.; 229-30 (5th ed., 1984).

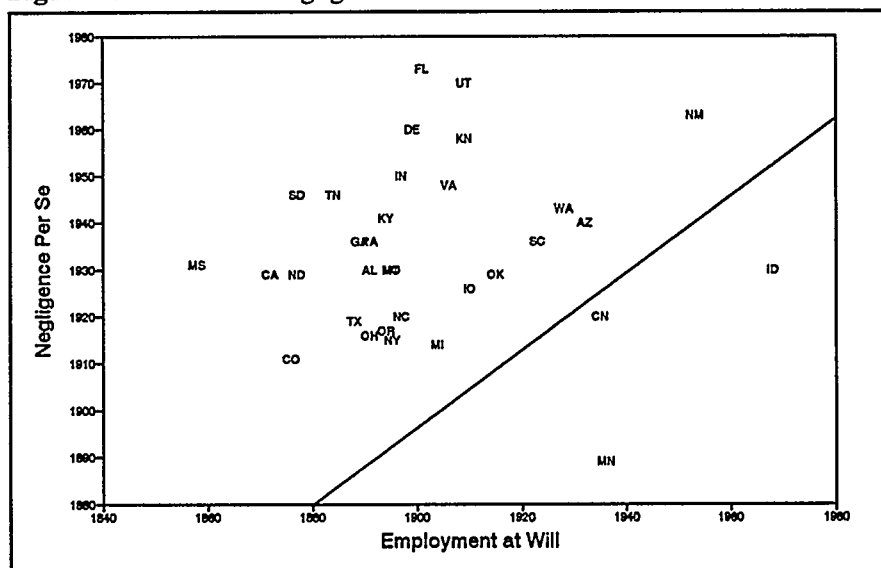
Single indivisible injury: Where more than one cause contributes to an indivisible harm, such as death, each cause may be required to pay the full damages individually. *Id.* at 347.

Attractive nuisance: Some nuisances, like railway turntables, might attract children and the owner was therefore considered responsible when they did attract child trespassers. *Id.* at 399-401.

Impact doctrine: The impact doctrine required a physical injury before damages for mental distress could be sought. *Id.* at 364-65.

rule. Each of these innovations was an anti-business doctrine, since it led to increased liability. Under the Feinman hypothesis, one would expect that early adopters of the at-will rule would be late adopters of these innovations.<sup>193</sup> Figures 7, 8, 9, and 10 show the results. As these Figures demonstrate, there does not appear to be an association between the adoption of the at will rule and any of the four tort doctrines and there is clearly not the inverse association predicted by the Feinman hypothesis during either the period 1870-1908 or the longer term.

Figure 7: At Will & Negligence Per Se



193. If the rules were adopted simultaneously, then the points would cluster along the forty-five degree lines drawn on each graph. If the at-will rule was adopted first, the points should cluster above the forty-five degree line. If the tort rule was adopted first, then the points would cluster below the forty-five degree lines. If there was an inverse relationship, the points would cluster around a negatively sloped forty-five degree line.

Figure 8: .At Will & Single Indivisible Injury

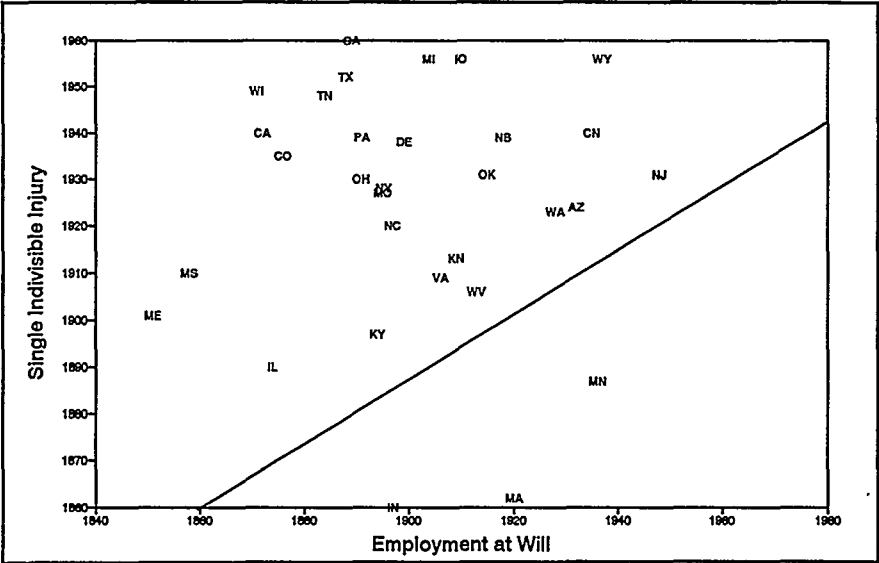
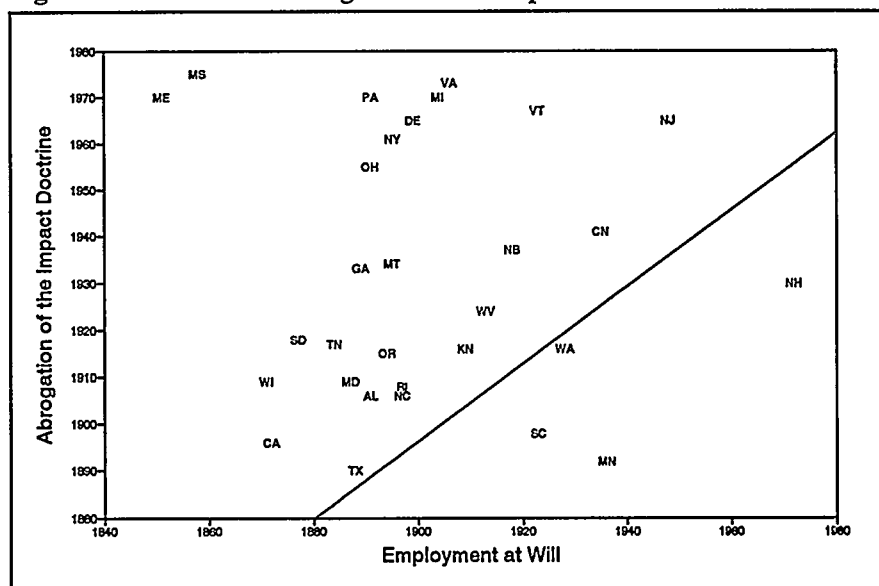


Figure 9: At Will & Attractive Nuisance



**Figure 10: At Will & Abrogation of the Impact Doctrine**

## VI. SOME LAST ILLUSIONS

Among the more persistent myths about the rise of the at will rule are its attribution to Horace Wood's 1877 treatise and the claim that the United States development was out of step with the rest of the world. Although neither could be tested econometrically, the following section shows that these myths are false.

### A. Wood's Treatise

Treatises played an important role in court's decisions in the late nineteenth century, being cited in a third to a half of state supreme court decisions.<sup>194</sup> The first treatise to recognize the at-will rule was Wood's 1877 treatise on master and servant. In it Wood set forth his now (in)famous formulation of the rule:

194. Friedman et al, *supra* note 51, at 811 (Table 10). The numbers are based on the national sample as described in the article.

[w]ith us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at-will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof.<sup>195</sup>

Wood's statement of the rule has produced a debate over whether his citations support his statement. Those intent on vilifying Wood tend to quote the language above and ignore the rest of the section containing it.<sup>196</sup> This narrow focus loses the richer context of the surrounding text and notes.

Wood began section 134 by discussing the English presumption of an annual contract. After a thorough discussion of the intricacies of that rule's application, Wood explained that he discussed the English rule and cases only because English law is a frequent source for United States lawyers and "not because it has any applicability to the law upon these questions as administered by our courts[.]"<sup>197</sup> He then noted that the interpretation of indefinite employment contracts in England was usually an issue in settlement cases<sup>198</sup> and not in master-servant disputes. After stating the rule, Wood continued with a lengthy discussion of the circumstances under which a contract will not fall under the rule. He concluded that only where there was evidence of a mutual understanding "that the service was to extend for a certain fixed and definite period" was the contract was not indefinite.<sup>199</sup>

Wood's "innovation," if indeed he made any innovation at all, was to emphasize the irrelevance of the pay period as evidence of the parties' mutual intent. Wood's reliance (in footnote four) on non-employment contract cases as support for the proposition that, absent mutual intent to create a relationship lasting for more than a specified time, the contractual relationship was

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195. WOOD, 1ST EDITION *supra* note 6 at 272 (footnotes omitted).

196. See, e.g., Feinman, *supra* note 2, at 126.

197. WOOD, 1ST EDITION, *supra* note 6, at 272.

198. The English rule applied originally to disputes between counties over the poor relief payments. See GEORGE BOYER, AN ECONOMIC ANALYSIS OF THE ENGLISH POOR LAW 1750-1850 (1990). Frequently cited is the Hammonds' reference to "endless litigation" over the issue. J.L. AND B.L. HAMMOND, THE VILLAGE LABOURER, 1760-1832, at 155 (1920). See also, LAWRENCE FRIEDMAN, CONTRACT LAW IN AMERICA 42-46 (1965), which notes "ten thousand" cases in one county in England 1858-1867. Further evidence that Wood thought the English cases irrelevant comes from his edition of ADDISON ON CONTRACTS. Published in 1888, Wood's edition included notes of United States cases. Wood added no notes to the lengthy section discussing the English rule. C. G. ADDISON, ADDISON ON CONTRACTS, AMERICAN NOTES BY BENJAMIN V. ABBOTT; BROUGHT DOWN TO DATE BY HORACE G. WOOD (Boston, Charles H. Edson & Co.) (8th ed. 1888).

199. WOOD, 1ST EDITION, *supra* note 6 at 272-73.



at-will appears to have been simply the application of a general principle to a particular type of contract.<sup>200</sup>

Despite the attention paid to footnote four of Wood's treatise, no one, to my knowledge, has examined the changes Wood made between his first edition in 1877 and the second edition's publication in 1886.<sup>201</sup> Wood added, according to the preface to the second edition, over three hundred pages of new material to his nine hundred fifty-six page first edition, yet kept the overall size the same by eliminating material.<sup>202</sup> Despite the scope of these changes, Wood made only three changes to section 134.<sup>203</sup> First, he changed the salary<sup>204</sup> in an example given in the first edition based on *Tatterson v. Suffolk Manufacturing Co.*<sup>205</sup> to fit the facts of *Haney v. Caldwell*.<sup>206</sup> He also changed the footnote following that example. It now cited *Haney* and included expanded text citing and describing additional cases.<sup>207</sup> Second, he added a discussion of a New York case dealing with a satisfaction contract to the end of the section.<sup>208</sup> Third, Wood added an

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200. Wood also had the unusual (for the time) practice of giving the "gist" of leading cases in the notes, to assist the reader who did not have access to all the reporters cited. He did not give the "gist" of the cases cited in footnote four, suggesting he did not view them as leading cases establishing a rule or principle but merely as illustrations of the principle's application.

201. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES, AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (Albany, N.Y., John D. Parsons, Jr.) (2d ed. 1886) [hereinafter WOOD, 2ND EDITION].

202. Preface to, WOOD, 2ND EDITION, *supra* note 201.

203. WOOD, 2ND EDITION, *supra* note 201, at section 136.

204. The change was from \$800 per year to \$2,500 per year.

205. 106 Mass. 56 (1870).

206. 35 Ark. 156 (1879).

207. Footnote 7, p. 273 of first edition; footnote "7", p. 285 of the second edition. (Note that the footnote is incorrectly numbered at the foot of the page, but not in the text, as 7 when it should be, as in the text, 1.)

The footnote now also included citation to, and discussion of, *Orr v. Ward*, 73 Ill. 318 (1874); *Horn v. Western Land Ass'n*, 22 Minn. 233 (1875); *Capron v. Strout*, 11 Nev. 304 (1876); and *Wilson v. Board of Ed. of Lee's Summit*, 63 Mo. 137 (1876) in support of Wood's position. He also mentioned *Tatterson* again, as well as a "but see" cite to South Carolina case concerning a bank teller, *Union Bank of South Carolina v. Heyward*, 15 S.C. 296 (1881). In *Union Bank* a bank teller who was dismissed after a salary dispute refused to return to the bank cash in the amount of his salary for the year. The bank sued for return of the money and the ex-teller defended on the ground he was entitled to the money. The teller lost because any right to the money he might have had would accrue only after he had completed the term of the contract. The issue of what the term of his contract was never arose.

208. The additional language was: "In a New York case the defendant employed the plaintiff for a week, and if she suited, to continue during the summer months.

additional citation to footnote four, the subject of the modern day controversy, on the issue of whether an employee hired for a share of the profits was hired for a year under English law.<sup>209</sup>

Wood explained his choice of new citations in the preface:

I have not cited all the cases which have been decided upon questions germane to the subject since the work was first issued, but have confined myself mainly to those which involved new questions, and have omitted those relating merely to questions about which there is no question or dispute.<sup>210</sup>

This suggests that Wood did not view his statement of the at-will rule as needing additional support, since he could have cited additional cases.<sup>211</sup> The case he added to footnote four merely supported his interpretation of English law, it did not address the rule itself. The other changes were relatively minor as well, and did not address the primary point of the section: the statement of the at-will rule. Thus, Wood must have felt that there was "no question or dispute" about the at-will rule. Presumably, therefore, there had not been sufficient complaints to Wood, or indirectly in the legal press,<sup>212</sup> over his statement of the rule to warrant a response. The changes

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Before the end of the week, the defendant declared that the plaintiff suited, and the plaintiff said: "Then, as long as I suit you, there is no fear for the summer months;" to which the defendant replied that there was not. It was held that the employment remained conditional on the plaintiff continuing to suit the defendant." The case cited was *Daveney v. Shattuck*, 9 Daly (N.Y.C.P.) 66 (1880). WOOD, 2ND EDITION, *supra* note 201, at 286 n.1.

209. The new case was *Boogher v. Maryland Life Ins. Co.*, 8 Mo. App. 533 (1880). WOOD, 2ND EDITION, *supra* note 201, at 283, n.5.

210. *Preface to* WOOD, 2ND EDITION, *supra* note 201.

211. *Payne v. Western and Atl. R.R.*, 81 Tenn. 507 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915) (*see* note 11 *supra*), the 1884 Tennessee case frequently cited today for its formulation of the rule, for example, is cited by Wood in the second edition in a different section. *See* WOOD, 2ND EDITION, *supra* note 201, Section 94, "Regulations of employer, when binding upon servant," 186-87, and 187, n.1.

212. The legal press received Wood's treatise favorably. Wood's first edition had received a glowing review in the *Albany Law Journal*:

[t]he outline of the topics, the method of treatment, the completeness of the array of cases, the skill in reconciliation of conflicts, and the resulting correct statement of legal principles, in a style of composition clear, precise, and accurate; these are the prime tests of the practical utility of [Wood's] labor. And in all these respects Mr. Wood may be congratulated on his success.

*Wood's Law of Master and Servant*, 15 ALBANY L. J. 378 (May 12, 1877).

he did make are sufficiently detailed to be convincing evidence that Wood carefully reviewed the section before publicity of the second edition. The changed example, in particular, suggests Wood engaged in both a close rereading of the material and a careful editing of the section.

### *B. United States Exceptionalism*

Pointing to modern differences between the United States' and other industrialized nations' wrongful discharge law and to the nineteenth century British rule of a presumed term, the critics of the at-will rule have found further ammunition for their assault on the rule.<sup>213</sup> Regardless of whether the United States is currently out of step with 'progressive' legislation and practice in Europe and Japan or merely escaping 'Eurosclerosis,' if it were true that nineteenth century Europe presented a uniform alternative to the at-will rule, the rule's development would be puzzling. The control of the ruling elites was weaker in the nineteenth-century United States than in Europe and judicial independence was greater here than there. How could only the United States judicially develop the rule which enabled capitalists to put their the evil plan into effect? Even if one rejects, as we should, the notion that the at-will rule was the result of capitalist manipulation of the judiciary, the puzzle of why the rule arose only here remains.

The critics' most frequent comparison is to Britain. Yet Britain's rules are as unique as the United States' rule. The dominant feature of employment law in Britain between 1823 and 1875 was the extensive involvement of the state in enforcing employment contracts. The state gave employment contracts special treatment under several statutes. The most important of these statutes was 4 Geo. 4, 34,<sup>214</sup> passed in 1823.<sup>215</sup> Three important

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213. See, e.g., Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORD. L. REV. 1082, 1082-83 (1984). Sanford Jacoby's article is much more thorough in its analysis of British employment law. See Jacoby, *supra* note 2.

214. The statute read:

[t]hat if any Servant in Husbandry or any Artificer, Calico Printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, Labourer or other person, shall contract with any Person or Persons whomsoever, to serve him, her or them for any Time or Times whatsoever, or in any other Manner, and shall not enter into or commence his or her Service according to his or her Contract (such Contract being in Writing, and signed by the contracting Parties), or having entered into such Service shall absent himself or herself from his or her Service before the Term of his or her Contract, whether such Contract shall be in Writing or not in Writing, shall be completed, or neglect to fulfil the same, or be guilty of any other Misconduct or Misdemeanor in the Execution thereof, or

features of this statute were unique to Britain: (1) criminal enforcement of employment contracts was available against employees but not employers; (2) enforcement was through summary procedures conducted by local magistrates without juries; and (3) appeals were both formally limited and generally recognized as futile. At a time when the entire privately employed labor force of England and Wales was between ten million (1861) and slightly more than eleven million (1871),<sup>216</sup> there were more than a hundred thousand convictions between 1860 and 1875<sup>217</sup> and only *ninety-three* appeals.<sup>218</sup> While

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otherwise respecting the same, then and in every such Case it shall and may be lawful for any Justice of the Peace of the County or Place where such Servant in Husbandry, Artificer, Calico Printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, Labourer or other Person, shall have so contracted, or be employed or be found, and such Justice is hereby authorized and empowered, upon Complaint thereof made upon Oath to him by the Person or Persons, or any of them, with whom such Servant in Husbandry, Artificer, Calico Printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, Labourer or other Person, shall have so contracted, or by his, her or their Steward, Manager, or Agent, which Oath such Justice is hereby empowered to administer, to issue his warrant for apprehending every such Servant in Husbandry, Artificer, Calico Printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, Labourer or other Person, and to examine into the Nature of the Complaint; and if it shall appear to such Justice that any such Servant in Husbandry, Artificer, Calico Printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, Labourer or other Person, shall not have fulfilled such Contract, or hath been guilty of any other Misconduct or Misdemeanor as aforesaid, it shall and may be lawful for such Justice to commit every such Person to the House of Correction, there to remain and be held to hard Labour for a reasonable Time, not exceeding Three Months, and to abate a proportionable Part of his or her Wages, for and during such Period as he or she shall be so confined in the House of Correction, or in lieu thereof, to punish the Offender by abating the Whole or any Part of his or her Wages, or to discharge such Servant in Husbandry, Artificer, Calico Printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, Labourer or other Person from his or her Contract, Service, or Employment, which Discharge shall be given under the Hand and Seal of such Justice *gratis*.

215. Parliament extended the provisions of this statute to cover additional employees with 10 GEO 4, 23.

216. B.R. MITCHELL, ABSTRACT OF BRITISH HISTORICAL STATISTICS, Table "Labour Force I," at 60 (1962). Calculation based on total occupied workers less those in public administration and the armed forces.

217. The years for which the statistics are available and the law was in effect. See Morriss, *supra* note 8, Chapter 2 for a full description of these statistics and other sources concerning enforcement of these laws.

it is true that the British state exercised its power primarily against employees lower on the socioeconomic scale than the employees in the United States who sued for breach of their employment contracts, the rule in the United States applied to all employees. The British backdrop undoubtedly influenced the rule's construction. Against such a background, employment at-will undoubtedly seemed a step forward of which British employees could only dream. Most importantly, the British rule is as unique as the United States' rule, neither represents a majority rule because the civilian countries took a conceptually different approach.

## VII. CONCLUSION

By basing the rule in nineteenth-century economic and legal conditions, many courts and commentators provide themselves with a rationale for their call for changes in the rule. They argue that changes in the United States' economy demand a new rule, one which is better suited to modern conditions.<sup>219</sup> The reason for the survival of the at-will rule is generally left by these accounts as an exercise for the interested reader.<sup>220</sup>

The problem with these stories is that they are wrong. As this paper has shown, employment at-will was not the product of a Horace Wood's mistaken analysis of five cases, nor was it the result of the demands of the capitalist class on their judicial minions. The reason these stories are wrong is that they failed to consider the courts as institutions. The alternative offered here suggests that a function for at-will contracts which is rooted in the courts' competence as decision makers to evaluate evidence concerning performance by white collar, skilled employees.

Courts' capacity to evaluate such evidence remains limited today. Far from being a relic of the nineteenth century, the at-will rule is a solution to

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218. These results are discussed in more detail in Morriss, *supra* note 8, Chapter 2. Statistics are from JUDICIAL STATISTICS, ENGLAND AND WALES (various years).

219. A frequently cited explanation of the changed economic circumstances is the quote from TANNENBAUM, A PHILOSOPHY OF LABOR, *supra* note 34.

220. One critic attributes it to judicial timidity. See e.g., Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for A Statute*, 62 VA. L. REV. 481, 521 (1976). Summers is representative: "[A]ny realistic hope for increased legal protection of employees must look for fulfillment to legislation, for the courts have thus far shown an unwillingness to break through their self-created crust of legal doctrine. . . . A few bolder judges have pointed the way, but the great majority have lacked the courage or desire to follow." Similarly, Cornelius Peck introduces an argument based on due process by arguing that additional arguments are needed "to force what is frequently a timid and reluctant judiciary to reconsider the problem on the merits." Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 3 (1979).

an institutional problem which remains important today. By mythologizing the rule's origins, the modern critics have undermined the rule without addressing the concerns which created it. Resolving conflicts between parties to any contract *ex post* is never as simple as it seems, and employment contracts are no exception to that rule. Before the common law rushes farther down the path the critics suggest, a fuller examination of the at-will rule's institutional role is needed.

This paper has shown that the rise of the employment at-will rule was more complex than the Feinman and industrialization stories. The explanation offered here is only a partial one. There remain several pieces of the puzzle. First, the mid to late nineteenth-century ideology of Free Labor is likely to have some intellectual connection with the rise of the at-will rule.<sup>221</sup> Second, the Jacoby hypothesis concerning judicial social class needs to be tested with data on state judges and the state pattern of adoption. Finally, the changes in the structure of the bar in the late nineteenth century require consideration.<sup>222</sup> These all suggest the direction in which further research should move.

The remaining piece of the puzzle in understanding the rise of employment at-will is explaining how a strong version of the rule came to be the dominant form. As discussed previously, the at-will rule itself says nothing about the strength of the evidence required to overcome its presumption. Allowing one to infer evidence of the term of the contract from the period used to calculate wages or to pay them, for example, is not inconsistent with a provision that in the absence of such a term the contract would be at-will. Indeed, as Freed and Polsby have argued, Wood's own formulation of the rule was quite flexible in the type of evidence which could overcome it. The place to begin is within the courts. One explanation which seems plausible is that given the availability of a gatekeeper rule like employment at-will, the desire of appellate judges to "correct" jury verdicts in this area may have inevitably lead to the strengthening of the rule. Further development of this issue must await another project, however.

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221. Free Labor's connection with labor law has been extensively studied. See, e.g., Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900*, 36 AM. J. LEGAL. HIST. 19 (1992).

222. See, e.g., Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerard W. Gawalt ed., 1984).

## Appendix A: Case and Code Citations for Adoption of At-Will Rule

This appendix lists the cases and code provisions relied on for dating the at-will rule. The following methods were used to locate cases: (1) the Decennial Digests were searched and all cases listed under "Termination of Employment" were read (not simply the headnotes) if they related to the ability of an employer to discharge an employee; (2) modern cases from each jurisdiction were examined to locate courts' own attempts to trace the history of the rule; (3) law review articles on specific states were examined for citations; (4) all cases cited in cases read were read themselves to ensure no earlier cases existed; and (5) treatises were examined for citations, which were then read.

Along with the citations are brief explanations for some states, explaining why my choice of a case differs from an obvious alternative or noting some unusual aspect of the rule's history.<sup>223</sup> States which simply list a citation are ones in which the choice was an obvious one.

### Alabama

Howard v. East Tennessee, Va. & Ga. R.R., 8 So. 868, 869 (Ala. 1891). "[I]n the absence of some agreement or peculiar circumstances connected with the engagement, to take it out of the general rule, unless some time is fixed during which the employment is to continue, either party may terminate the contract at-will." No prior authority was cited and no earlier references to the rule as applicable in Alabama were found.

### Alaska

Alaska was not a state during the relevant period.

### Arizona

Dover Copper Mining Co. v. Doenges, 12 P.2d 288, 291-92 (Ariz. 1932). "The general rule in regard to contracts for personal services, such as the one in the case at bar, where no time limit is provided, is that they are terminable at pleasure by either party, or at most upon reasonable notice." Although several decisions from other jurisdictions are cited, no prior Arizona decision is cited, and no earlier references to the rule as applicable in Arizona have been found.

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223. The empirical analysis is obviously sensitive only to the dating of the states included and only to changes in dating within the period included. Disagreements about adoption dates after 1908 which do not move the date of adoption to before 1908 would therefore not have any effect on the results.

**Arkansas**

St. Louis, Iron Mountain & S. R. v. Mathews, 42 S.W. 902 (1897). The court held that an agreement not to discharge except for cause and granting discharged employees a right to arbitration could not be enforced in a contract action as the contract did not specify a duration for which the employees were to be employed. "Hence there was no contract that he would serve, and that the appellant would employ him, for any stated time,—the agreement of both being necessary to fix the time of service,—and, consequently, no violation of a contract by the discharge of appellee before the expiration of any particular time." This case is cited by *Tinnon v. Missouri Pac. R.R.*, 282 F.2d 773, 776 (8th Cir. 1960) and *Halsell v. Kimberly-Clark Corp.*, 518 F.Supp. 694, 696 (E.D. Ark. 1981), as the source of the rule in Arkansas.

*Haney v. Caldwell*, 35 Ark. 156 (1879), is sometimes cited for the at-will rule. See, e.g., *McCullough Iron Co. v. Carpenter*, 11 A. 176, 178 (Md. 1887). The issue in *Haney* was not the term of a contract but whether a jury instruction that the defendant would prevail if at any time the plaintiff (employee) was not ready to perform services. The court held

The letter referred to was not a special contract for a definite time, and at a fixed price, the complete performance of which was a condition precedent to a right to compensation. . . . Plaintiff was not bound by the terms of the letter referred to, to serve, or to offer and hold himself in readiness to serve, as an engineer, for any definite period as a condition precedent to a right to compensation. If plaintiff was employed as by the letter to serve as an engineer, and he served as an engineer according to the terms thereof . . . he was entitled to compensation for such period at the rate agreed upon  
....

*Haney*, 35 Ark. at 168-69. Thus the issue was not the right of discharge under an indefinite contract but the right to compensation for services performed under the contract prior to discharge.

**California**

1872 Civil Code, § 1999. No cases prior to the Civil Code's adoption relying on the rule were found.

**Colorado**

*Kansas Pac. Ry. v. Roberson*, 3 Colo. 142 (1876). This case is cited by *Bauer v. Goldman*, 100 P. 435, 436 (Colo. 1909), as the source of the rule.



## Connecticut

*Boucher v. Godfrey*, 178 A. 655 (Conn. 1935). *Boucher* relies on *Coppage v. Kansas*, 236 U.S. 1 (1915), and out of jurisdiction cases. *Somers v. Cooley Chevrolet Co.*, 153 A.2d 426, 428 (Conn. 1959), the case cited by most modern opinions for the rule, cites to *Boucher* as the source of the rule in Connecticut.

## Delaware

*Greer v. Arlington Mills Mfg. Co.*, 43 A. 609, 610 (Del. Super. Ct. 1899). The court notes that the Delaware courts have not previously passed on the issue and adopts the at-will rule after examining carefully the alternatives. This is a trial court opinion and is cited by modern Delaware courts. No Delaware appellate opinions on this issue appeared until modern times.

## District of Columbia

*J.E. Hanger, Inc. v. Fitzsimmons*, 273 F. 348, 350 (D.C. 1921). "This being a contract of employment, in which there is no express or implied provision as to its duration, we agree with the [lower] court that it was terminable at the will of either party." The court cites only Maryland, Missouri, and Pennsylvania cases.

## Florida

*Savannah, F. & W. Ry. v. Willett*, 31 So. 246, 247 (Fla. 1901). The court cites only out of jurisdiction cases and Wood's treatise.

## Georgia

*Magarahan v. Wright & Lamkin*, 10 S.E. 584 (Ga. 1889). Georgia adopted a civil code in 1895. Section 2614 (now section 34-7-1), which codified the at-will rule, cited *Magarahan* as the source of the rule. The Georgia version of the rule is not as strong as many states, suggesting that overcoming the presumption of an at-will contract is easier than in, for example, New York. The *Magarahan* court spent a great deal of time discussing the implications of various facts, including the period used to determine pay, and ultimately concluded that the contract in question was for a month based on the salary period.

## Hawaii

Hawaii was not a state during the relevant period.

**Idaho**

Thomas v. Ballou Latimer Drug Co., 442 P.2d 747, 751 (Idaho 1968). *Thomas* does not cite any earlier Idaho cases and discusses the alternative “English” rule in detail before adopting the at-will rule.

**Illinois**

Orr v. Ward, 73 Ill. 318, 319-20 (Ill. 1874). Since no definite term was specified in the written contract, which did specify the rates of pay for the first and second years of employment, the contract could be ended at any time.

**Indiana**

Speeder Cycle Co. v. Teeter, 18 Ind. App. 474, 477 (Ind. Ct. App. 1897). The court adopts the at-will rule, noting that “[t]he rule seems well settled, by the great weight of authority.” No authority is cited and no prior references to the rule have been found.

**Iowa**

Harrod v. Wineman, 125 N.W. 812, 813 (Iowa 1910). The court specifically rejects the English rule and notes the employee could have protected himself by getting a term contract.

**Kansas**

Atchison, Topeka & Santa Fe Ry. v. Brown, 102 P. 459, 460 (Kan. 1909). The rule is mentioned in the discussion of the constitutionality of a statute requiring employers to provide discharged employees a “service letter” upon discharge, which includes the reason for the discharge. The court notes that “[i]t has been conceded in argument that in the absence of a contract of employment for a definite term the master may discharge the servant for any reason or for no reason, and that the servant may quit his employment for any reason or for no reason.” As a result, it infringes on the employer’s constitutional right to free speech, by forcing the employer to speak on the subject of the discharge.

## Kentucky

Louisville & Nashville R.R. v. Harvey, 34 S.W. 1069, 1070 (Ky. 1896). This case is cited as the source of the "well-settled rule" on indefinite contracts in Louisville & Nashville R.R. v. Offutt, 36 S.W. 181, 183 (Ky. 1896).

## Louisiana

The Louisiana Civil Code of 1808, article 57, provided: "A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause." The identical language appears today as article 2747. No such provision was present in the Code Napoleon of 1804, but the same provision appeared in the *Projet du Gouvernement* (1800), Book III, Title XIII, Art. 112. Courts have consistently applied this section to employment relations. *See, e.g.,* Simmons v. Westinghouse Elec. Corp., 311 So.2d 28, 31 (La. Ct. App. 1975).

## Maine

Blaisdell v. Lewis, 32 Me. 515, 516 (1851). Terrio v. Millinocket Community Hosp., 379 A.2d 135, 137 (Me. 1977), cites *Blaisdell* as the source of the rule.

## Maryland

McCullough Iron Co. v. Carpenter, 11 A. 176 (Md. 1887). *McCullough* does not cite any prior Maryland cases, only Wood's treatise and other jurisdictions' cases. Olmstead v. Bach, 27 A. 501, 503 (Md. 1893) cites *McCullough* as the source of the rule.

## Massachusetts

Mechanics' Foundry & Mach. Co. v. Lynch, 128 N.E. 877, 878 (1920) is the first acknowledgment of the at-will rule as applicable in Massachusetts, citing *Coppage*. Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1255 (Mass. 1977), which significantly limited the at-will rule, cites *Lynch* as the source of the rule. Prior to *Lynch*, Massachusetts had rejected the at-will rule. *See* Maynard v. Royal Worcester Corset Co., 85 N.E. 877 (Mass. 1908); Carnig v. Carr, 46 N.E. 117, 118 (Mass. 1897).

**Michigan**

*Sullivan v. Detroit, Ypsilanti & Ann Arbor Ry.*, 98 N.W. 756, 760 (Mich. 1904). The court does not cite any Michigan cases in applying the rule to a “permanent” contract. *Lynas v. Maxwell Farms*, 273 N.W. 315, 316-17 (Mich. 1937), cites *Sullivan* as the Michigan authority for the at-will rule.

**Minnesota**

*Skagerberg v. Blandin Paper Co.*, 266 N.W. 872 (Minn. 1936). *Phipps v. Clark Oil & Refining Co.*, 396 N.W.2d 588, 590 (Minn. Ct. App. 1986) traces the rule to *Skagerberg*.

**Mississippi**

*Butler v. Smith & Tharp*, 35 Miss. (6 Geo.) 457, 464 (1858). *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086, 1088 (Miss. 1987) cites this case as the source of the rule in Mississippi.

**Missouri**

*Harrington v. Kansas City Cable Ry.*, 60 Mo. App. 223 (Mo. Ct. App. 1895).

**Montana**

Civil Code § 2703.

**Nebraska**

*State v. Employers of Labor*, 169 N.W. 717 (Neb. 1918). Cited as source of rule by *Stewart v. North Shore Produce Co.*, 248 N.W.2d 37, 38 (Neb. 1976).

**Nevada**

In *Capron v. Strout*, 11 Nev. 304 (1876), the court interpreted a contract under which the employee was paid monthly, at a daily rate of pay, to be a contract for a month. Although similar to the at-will rule in some respects, this rule did provide the employee with some measure of protection against sudden discharge. Recent Nevada cases limiting the at-will rule simply assert the existence of the at-will rule, without citation of authority.

### New Hampshire

No early New Hampshire cases explicitly adopts the at-will rule or discusses the issue. Recent cases limiting the rule simply assert its existence. See, e.g., *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551-52 (1974).

### New Jersey

The first use of the at-will rule by New Jersey courts came in *Schlenk v. Lehigh Valley R.R.*, 62 A.2d 380 (N.J. 1948). In that case, the court noted that in the absence of a contract, the at-will nature of the employment relationship prevents equitable relief for discharged employees. In *Schlenk* there was a contract, however, and so the court went on to consider the claim for equitable relief. *Schlenk* is cited by *English v. College of Medicine and Dentistry of New Jersey*, 372 A.2d 295, 297 (N.J. 1977), as the source of the rule.

In the nineteenth century, New Jersey followed a pay period rule, where the pay period was considered sufficient to create a term for the contract. *Beach v. Mullin*, 34 N.J.L. 343, 345 (N.J. 1870).

### New Mexico

*Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123, 128 (10th Cir. 1953). The Tenth Circuit, citing only federal authority, simply assert the rule's applicability to New Mexico. The New Mexico Court of Appeals cited *Odell* as a source of the rule (along with post-*Odell* state court decisions) in *Bottiglioso v. Hutchison Fruit Co.*, 635 P.2d 992, 994 (N.M. 1981).

### New York

*Martin v. New York Life Ins. Co.*, 148 N.Y. 117 (1895). Freed and Polsby cite *Ward vs. Ruckman*, 34 Barb. 419 (N.Y. App. Div. 1861), as evidence that New York recognized the doctrine early. Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Woods Rule" Revisited*, 22 ARIZ. ST. L.J. 7 551, 552 n.23 (1990). In *Ward*, however, the plaintiff sought compensation for the conversion of his partial interest in a schooner, which he argued entitled him to be master of the schooner. Citing *Story on Partnership* and an English case, the court held that the plaintiff's right to be master of the ship was based on his contract with his co-owner, not on his ownership share. While *Ward* certainly recognized that at-will contracts were possible, it did not apply a default rule to the contract itself. Certainly the *Martin* court did not view *Ward* as relevant as it did not cite *Ward*, and explicitly discussed the question as an open one in New York.

**North Carolina**

Edwards v. Seaboard & R.R., 28 S.E. 137 (N.C. 1897).

**North Dakota**

Dakota Territorial Civil Code § 1152 (1877).

**Ohio**

In *Proctor & Gamble v. Snodgrass*, 3 Ohio Circ. Dec. 268 (Ohio Ct. App. 1890) the circuit court of appeals adopted the at-will rule. The Cincinnati Superior Court, General Term followed this decision in its decision in *Carthage Wheel Co. v. Kelly*, 5 Ohio N.P. 310 *rev'd* *Kelly v. Carthage Wheel Co.*, 57 N.E. 984, 986 (Ohio 1900). The Ohio Supreme Court noted there that there was “a want of harmony” on the duration of a contract at a specified rate of pay per year, but found it unnecessary to reach the issue based on the terms of the contract in question, which it found constituted a contract for a term of one year.

**Oklahoma**

*Arkansas Valley Town & Land Co. v. Atchison, Topeka & Santa Fe Ry.*, 151 P. 1028, 1032 (Okla. 1915). Although not an individual employment case, the court clearly endorsed the principle that indefinite contracts are terminable at-will and the case was later cited in support of the at-will rule. *See, e.g., Foster v. Atlas Life Ins. Co.*, 6 P.2d 805, 808 (Okla. 1932).

**Oregon**

*Christensen v. Pacific Coast Borax Co.*, 38 P. 127 (Ore. 1894).

**Pennsylvania**

*Henry v. Pittsburgh, Etc. R.R.*, 21 A. 157, 157 (Pa. 1891). “A railroad corporation, or an individual, may discharge an employe with or without cause at pleasure, unless restrained by some contract[.]”

An earlier case, *Coffin v. Landis*, 46 Pa. 426 (1864), held an agency contract terminable at-will. Although the opinion considered the application of the English rule, the decision turned on the fact that the contract was not one of continuous employment but rather of agency for the sale of land. Further, the court made clear that it was interpreting the contract between the parties. *Id.* at 431-33 (“Considering, then, *the nature of this agreement, its subject-matter, and its expressed stipulations*, we cannot hold that it binds the

defendant to employ the plaintiff, or obliges the plaintiff to remain in the agency any longer than during the will of the parties, without interpolating what they left out, and without danger of defeating their intentions when the contract was made." *Id.* at 433. emphasis added.)

The Pennsylvania Supreme Court finally addressed the issue in *Weidman v. United Cigar Stores Co.*, 72 A. 377 (1909). The court noted the rule, but held that the contract in question was sufficiently definite enough to take it out of the rule.

### **Rhode Island**

*Booth v. National India-Rubber Co.*, 36 A. 714 (R.I. 1897).

### **South Carolina**

*Gantt v. Southern Ry.*, 118 S.E. 920, 921 (S.C. 1923). A finding that "[t]here is no evidence to show any term of employment[,]" the court reversed a judgment for the employee since the lack of a term meant there was no basis for a claim. No authority was cited. The defendant had moved for a nonsuit on the grounds that the contract was at-will, and the court found that the nonsuit should have been granted. An earlier case, *Gregory v. Cohen*, 50 S.C. 502 (1897), held a particular contract to be on its facts an at-will contract. The default rule the court stated, however, was the pay period rule. *Id.* at 507.

### **South Dakota**

Dakota Territorial Civil Code, § 1152.

### **Tennessee**

*Payne v. Western and Atl. R.R.*, 81 Tenn. 507 (1884), *rev'd on other grounds* *Hutton v. Watters*, 179 S.W. 134 (1915). Discussed *supra* note 11.

### **Texas**

*East Line & R.R. v. Scott*, 10 S.W. 99 (Tex. 1888).

### **Utah**

*Price v. Western Loan & Savings Co.*, 100 P. 677 (Utah 1909).

**Vermont**

Mullaney v. C.H. Goss Co., 122 A. 430 (Vt. 1923).

**Virginia**

Stonega Coke & Coal Co. v. Louisville & N.R.B., 55 S.E. 551, (Va. 1906).

**Washington**

Davidson v. Mackall-Payne Veneer Co., 271 P. 878, 879 (Wash. 1928), states the rule as "well settled" but cites only cases from other states.

**West Virginia**

Resener v. Watts, Ritter & Co., 80 S.E. 839 (W.Va. 1913).

**Wisconsin**

Prentiss v. Ledyard, 28 Wis. 131 (1871).

**Wyoming**

Casper Nat'l Bank v. Curry, 65 P.2d 1116, (Wyo. 1937).

**Appendix B: Additional Results**

The tables comprising this appendix are available from the author:

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